IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-6067

BILLY DUREN,

Petitioner,

-vs-

STATE OF MISSOURI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MISSOURI SUPREME COURT

BILLY DUREN,
Petitioner,

LEE M. NATION,
JAMES W. FLETCHER,
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I N D E X

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Taylor v. Louisiana, 412 U.S. (1975)

Hoyt v. Florida, 368 U.S. 57, 7 L.Ed.2d 118, 82 S.Ct. 159 (1961)

State v. Billy Duren, 556 S.W.2d 11, 24, n.4 (1977)

State v. Gethers, 227 S.E.2d 832 (Ga.App.1976)

Robinson v. Kimbrough, 540 F.2d 1264 (5th Cir.1976)

New York Judiciary Law 549(7)

STATUTES:

Sixth Amendment, United States Constitution

Fourteenth Amendment, United States Constitution

Article I, 22(b), Missouri Constitution

§497.130, Missouri Revised Statutes

New York Judiciary Law 549(7)

Conn.Gen.Stat.Rev. §51-218, 219

Ga.Code Ann.§ 59-112(6)

La.Stat.Ann.§ 13-3055

Okla.Stat.Ann. Title 38 §28

Rhode Island Gen.Laws Ann. §9-9-11

Utah Code Ann.§78-46-10(14)

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

Petitioner, BILLY DUREN, prays that a writ of certiorari issue to review the judgment and opinion of the Missouri Supreme Court entered in the above-entitled case on October 15, 1977.

OPINION BELOW

The opinion and decision of the Missouri Supreme Court is reported at *556 S.W.2d 11*. A copy of the opinion appears in Appendix A attached hereto.

JURISDICTION

The judgment of the Missouri Supreme Court (Appendix A) was originally entered on September 27, 1977. Thereafter, on September 29, 1977, a timely motion for rehearing was filed. see, Rule 84.17, Missouri Rules of Court. Petitioner's motion for rehearing was overruled by the Missouri Supreme Court on October 11, 1977. By the aforesaid denial of the motion for rehearing, the opinion and decision of September 27, 1977 became the final judgment of the highest court in the State of Missouri.

The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

I

WHETHER MISSOURI'S STATUTORY AND CONSTITUTIONAL SCHEME FOR THE SELECTION OF PETIT JURORS -- WHICH GRANTS WOMEN AN AUTOMATIC EXEMPTION BASED SOLELY ON SEX -- DENIED PETITIONER HIS RIGHT TO TRIAL BY JURY AND DUE PROCESS OF LAW AS MANDATED AND INTERPRETED BY THIS COURT'S OPINION IN *Taylor v. Louisiana, 412 U.S. (1975)*. 2

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Sixth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution:

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,. . ."

Fourteenth Amendment

". . . No State shall make or enforce any law which shall abridge theprivileges or immunities of citizens of the United States' nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction of the equal protection of the laws."

STATEMENT

Petitioner, BILLY DUREN, was charged by indictment with the crimes of Murder, First Degree and Robbery, First Degree. Jury trial was held in the Jackson County Circuit Court (Clark,J.) in Kansas City. Verdicts of guilt were returned as to each count and Petitioner was sentenced to two terms of life confinement in the Missouri Division of Corrections.

HOW FEDERAL QUESTIONS ARE PRESENTED

1. Prior to trial, Petitioner filed a motion to quash the petit jury panel on the basis that women were systematically excluded from jury service. A hearing was held: John Fitzgerald, Jackson County Jury Commissioner, testified that potential jurors are randomly selected from the Jackson County voter registration lists; these persons are sent questionnaires to determine their eligibility for jury service. By statute, this questionnaire prominently states:

"TO WOMEN:

The Constitution permits women to elect to serve or not to serve as jurywomen. Any woman who elects not to serve will fill out this paragraph and mail this questionnaire to the jury commissioner at once. It will not be necessary to answer the other questions.

I elect not to perform jury service."

See Appendix 11, Exhibit 1. Questionnaires returned showing no exemptic were placed in the jury wheel. Evidence was received that the jury wheel was 29.1% female. Each week, names are randomly selected for jury service; these persons are then sent summons for jury service. The summons reads:

"Women, if you do not wish to serve, return this summons to the Judge named on the reverse side as quickly as possible."

See Appendix 2, Exhibit 2. The Jury Commissioner also testified that if a woman failed to respond to the summons, she was deemed to have exercised her option not to serve. Evidence was also received concerning the number of women appearing for jury service prior to Petitioner's trial. That evidence is as follows: June, 1975 - 15.9% women; July, 1975 - 15.1% women; August, 1975 - 13% women; September, 1975 - 13.7% women; October, 1975 - 10.9% women; January, 1976 - 12.3% women; February, 1976 - 17.6% women; March, 1976 - 15.5% women. Petitioner's panel of fifty-three (53) had five (5) women (9.4%) and his jury of twelve was all male. Census data was also received showing Jackson County, Missouri to be 54% women.

At the close of Petitioner's presentation, the State produced no evidence and the motion to quash was overruled.

2. Subsequent to his trial, Petitioner filed a timely motion for new trial alleging the instant allegation. A timely appeal was prosecuted to the Missouri Supreme Court which held consolidated arguments on the cases *State of Missouri vs. Billy Duren; State of Missouri vs. Eugene Minor, State of Missouri vs. Emerson E. Harlin,* and *State of Missouri v. Vincent X. Lee* (petitions for writs of certiorari on these cases are being filed concurrently herewith). The opinion affirming Petitioner's conviction became final on October 11, 1977. The question presented herein was raised and argued before the trial court and the Missouri Supreme Court.

REASONS FOR GRANTING THE WRIT

The opinion and decision of the Missouri Supreme Court in the instant case is in direct conflict with past decision of this Court, various federal courts of appeals and several state high courts. Specifically, Petitioner contends the instant opinion is in conflict with *Taylor vs. Louisiana, 419 U.S. 522 (1975)* and thus, cannot stand. *Taylor* held Article VII, Section 41 of the Louisiana Constitution and Article 402 of the Louisiana Code of Criminal Procedure (since repealed) violative of *Taylor's* due process rights guaranteed by the XIV Amendment to the United States Constitution.

The Louisiana law is reproduced here for the convenience of the Court:

Article VII, Louisiana Constitution

§41. Selection of jurors; women jurors; trial by judge; trial by jury.

The Legislature shall provide for the selection and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishement may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

Louisiana Code of Criminal Procedure

Article 402. Service of women as jurors.

A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service.

The United States Supreme Court in *Taylor* re-examined the question of automatic exclusion of women from the juries previously decided by that Court in *Hoyt v. Florida, 368 U.S. 57, 7 L.Ed.2d 118, 82 S.Ct. 159 (1961)* and they reached a different result. Accordingly, the Court stated:

> "Accepting as we do however, the view that the VI Amendment affords the Defendant in a criminal trial the opportunity to have the jury drawn from venires representative of the community, we think it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequences are that criminal jury venires are almost totally male."
>
> *(42 L.Ed.2d 690 at 702)* [emphasis added]

The question presented herein then whether Missouri offers an "automatic exemption based solely on sex" and if, "the consequences are that criminal jury venires are almost totally male."

The Missouri Constitution, Article I, Section 22(b) states: "No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror." This Article is implemented by Section 497.130, Missouri Revised Statutes (1974), which section allows women to "elect to serve or not to serve as jury women."

When placed side by side and examined, the Missouri system and the Louisiana system (later changed) both offer an absolute exemption to jury service based strictly upon gender. The difference being only that in Louisiana the woman must affirmatively opt for service while her Missouri sister must affirmatively choose not to serve.

The Appellant's argument is much better stated by the United States Supreme Court's final paragraph in the *Taylor* opinion:

". . . but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."

The term "reasonably representative thereof" points out the failing of the panel to which the Petitioner objected. It cannot be said that five (5) women on a panel of fifty-three (53) is "reasonably representative" nor does that panel constitute a "cross-section of the community."

Petitioner concludes that "(t)he States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions. . ." *Taylor v. Louisiana, at 538.* Petitioner, however, does not believe that a blanket exemption for women is a reasonable exemption. Indeed, as pointed by Mr. Justice Seiler in his dissenting opinion in *State v. Billy Duren, 556 S.W.2d 11, 24, n.4 (1977):*

"The federal court (the United States District Court for the Western District of Missouri) provides for excuse on request by a woman charged with care of minor children without adequate domestic help."

Petitioner maintains that this is a reasonable exemption for women and would not serve to deny an accused his constitutional right to a representative jury: in the federal court in Kansas City, 53% of the persons on jury wheel are women and 39.8% of the actual jurors chosen were women. *556 S.W.2d at 24.* This data can be contrasted with the Missouri courts: 29% of the persons on the wheel are women; seldom over 15% of the persons appearing for jury service are women; and often, as in the case-at-bar, juries are all male.

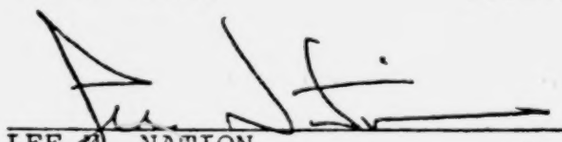
Since *Taylor*, several states have been faced with challenges to exemptions to women. All, except Missouri, have changed the exemption by either statute or court decision, see, e.g. *State v. Gethers, 227 S.E.2d 832 (Ga.App.1976); Robinson v. Kimbrough, 540 F.2d 1264 (5th Cir.1976); New York Judiciary Law 549(7); Conn. Gen.Stat.Rev. §51-218, 219; Ga.Code Ann. §59-112(6); La.Stat.Ann. §13-3055; Okla.Stat.Ann. Title 38 §28; Rhode Island Gen.Laws Ann. §9-9-11; Utah Code Ann.§78-46-10(14).* Missouri remains the only state with an automatic exemption for women. Further, this exemption causes gross underrepresentation of women on jury panels. (See attached exhibits as to the women appearing for jury service). The instant opinion cannot stand as a correct interpretation of this Court's opinion in *Taylor.* Unlike the Missouri Supreme Court, Petitioner does not believe *Taylor* stands for the proposition that any percentages of women on jury panels, higher than those found in *Taylor*, is constitutionally permissible; instead *Taylor* condemns jury mechanisms which deny an accused his right to a jury drawn from a reasonable cross-section of society. The Missouri jury selection system is of such a breed: Petitiner's panel (10% women) cannot be considered as representative of society.

Accordingly, a Writ of Certiorari should issue to review the opinion of the Missouri Supreme Court affirming Petitioner's conviction.

CONCLUSION

WHEREFORE, Petitioner respectfully requests this Court to issue a Writ of Certiorari to the Missouri Supreme Court.

BILLY DUREN Petitioner



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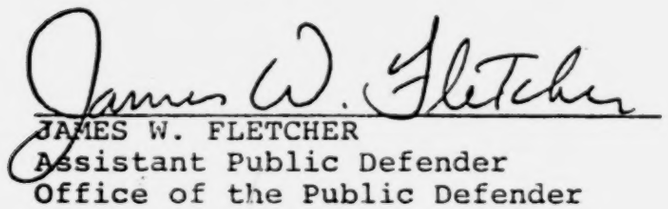

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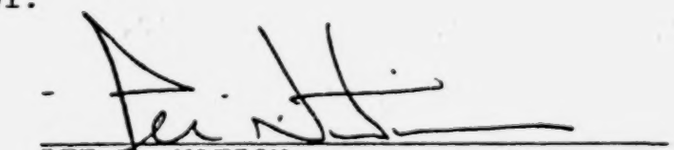
Counsel for Petitioner

A copy of the above and foregoing was mailed, postage prepaid, on this the 16th day of January, 1978 to Attorney General John Ashcroft, Office of the Attorney General, Supreme Court Building, Jefferson City, Missouri 65101.



LEE M. NATION

JAMES W. FLETCHER

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM 1978

No. 77-6067

BILLY DUREN

vs

THE STATE OF MISSOURI

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

PETITION FOR CERTIORARI
FILED JANUARY 19, 1978
CERTIORARI GRANTED MAY 1, 1978

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RELEVANT DOCKET ENTRIES

1. October 3, 1975. Indictment filed in Jackson County, Missouri Circuit Court charging Petitioner with Murder, First Degree and Assault With Intent To Kill With Pistol With Malace Aforethought.
2. October 8, 1975. Petitioner arraigned in Jackson County, Missouri Circuit Court, entering pleas of not guilty to both counts of the indictment.
3. February 4, 1976. Petitioner's amended Motion to Quash Jury Panel filed.
4. March 29, 1976. Hearing on Petitioner's amended Motion to Quash Jury Panel held: Exhibits One through Four admitted into evidence. State presented no evidence. Petitioner's amended Motion to Quash Jury Panel overruled.
5. March 31, 1976. Jury returns verdicts of guilt as to both counts.
6. April 14, 1976. Motion for New Trial filed.
7. April 21, 1976. Hearing on Motion for New Trial. Defense Exhibits One through Five admitted into evidence. Motion for New Trial overruled. Petitioner sentenced to consecutive terms in the Missouri Division of Corrections.
8. April 29, 1976. Notice of Appeal to the Missouri Court of Appeals, Kansas City District filed.
9. December 8, 1976. Cause transferred to Missouri Supreme Court prior to opinion by Court of Appeals.
10. September 27, 1977. Judgment and opinion of Missouri Supreme Court, affirming Petitioner's conviction, filed.
11. September 27, 1977. Dissenting opinion of Seiler, J. filed.
12. September 29, 1977. Motion for Rehearing filed.
13. October 11, 1977. Motion for Rehearing denied.
14. January 19, 1978. Petition for Writ of Certiorari filed.
15. May 1, 1978. Certiorari granted.

**IN THE CIRCUIT COURT OF MISSOURI,
SIXTEENTH JUDICIAL CIRCUIT**

DIVISION NO. 7

Case No. C–48011

STATE OF MISSOURI,

Plaintiff,

vs

BILLY DUREN,

Defendant.

INDICTMENT—FILED OCTOBER 3, 1975

Count I

MURDER FIRST DEGREE

Count II

ASSAULT WITH INTENT TO KILL
WITH PISTOL WITH MALICE

The Grand Jurors for the State of Missouri, duly summoned from the body of said County of Jackson, being duly impaneled, sworn and charged to inquire within and for said County, upon their oaths present and charge that at the County of Jackson and State of Missouri, on the 26th day of September, 1975, one BILLY DUREN, whose more full and true name is unknown to the members of the Grand Jury did then and there unlawfully, wilfully, feloniously, premeditatedly and deliberately and of his malice aforethought, either alone or knowingly acting in concert with another, make an assault in and upon one Carrol M. Riley, with a dangerous and deadly weapon, to-wit: .38 caliber revolver loaded with gunpowder and leaden balls, then and there inflicting upon the said Carrol M. Riley a mortal wound, and that from said mortal wound, the said Carrol M. Riley, within one year thereafter, to-wit: on the 26th day of September, 1975, at the County of Jackson and State of Missouri, died; against the peace and dignity of the State.

COUNT II

The Grand Jurors for the State of Missouri, duly summoned from the body of said County of Jackson, being duly impaneled, sworn and charged to inquire within and for said County, upon their oaths present and charge that at the County of Jackson and State of Missouri, on the 26th day of September, 1975, one BILLY DUREN, whose more full and true name is unknown to the members of the Grand Jury, did then and there unlawfully, wilfully, feloniously, either alone or knowingly acting in concert with another, and of his malice aforethought, make an assault and the said BILLY DUREN with a certain deadly weapon, to-wit: a pistol loaded with gunpowder and leaden balls, then and there feloniously, willfully, on purpose and of his malice aforethought, did shoot off at, against and upon said Lee Kinnison, then and there giving to the said Lee Kinnison in and upon the head and body of him, the said Lee Kinnison, with the pistol aforesaid did wound, with the felonious intent then and there him, the said Lee Kinnison, feloniously, wilfully, on purpose and of his malice aforethought, to kill and slay; against the peace and dignity of the State.

IN THE CIRCUIT COURT OF MISSOURI, SIXTEENTH JUDICIAL CIRCUIT

(Title Omitted in Printing)

AMENDED MOTION TO QUASH JURY PANEL—
filed February 4, 1976

Comes now the defendant, BILLY DUREN, by counsel, and moves the Court to quash any jury panel that may be produced as prospective jurors in this cause.

As grounds for this motion, the defendent alleges as follows:

1. Section 494.031, V.A.M.S., provides:

> The following persons shall upon their timely application to the court be excused from service as a juror either grand or petit. . .

2. Any woman who requests exemption before being sworn as a juror;. . . .

Article I, Section 22(b) of the Constitution of Missouri (1945) provides:

> No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror.

The "Official Notice and Questionnaire" prescribed by Section 497.130, V.A.M.S., for distribution to prospective jurors, contains the following paragraph:

> TO WOMEN:
>
> The constitution permits women to elect to serve or not to serve as jurywomen. Any woman who elects not to serve will fill out this paragraph and mail this questionnaire to the jury commissioner at once. It will not be necessary to answer the other questions.
>
> I elect not to perform jury service.
>
> _____
> (Signature)

These provisions, which result in a disproportionately small number of women being available for jury service, deny the defendant his right to have a jury panel selected from a fair cross-section of the community as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. *Taylor* vs *Louisiana*, U.S., 95 S.Ct. 692, 42 L.Ed.2d 690 (1975).

2. Section 497.130, V.A.M.S., also provides as follows:

> 1. The board of jury supervisors shall at least biannually compile a list of as many names as the board of jury supervisors designates in a written order made for the purpose of consulting any public records. . .
>
> The list in no case shall contain less than twenty-five thousand names to be selected as nearly as may be equally from the several voting precincts in the county. . . .

Defendant alleges that the lists of prospective jurors in Jackson County are not made up of names selected by "consulting any public records." Rather, prospective jurors are selected only from lists of registered voters, thereby drastically limiting the number of citizens that are potentially available for jury service. Therefore, jurypanels are not selected in accordance with the state law.

WHEREFORE, the defendant prays the Court to quash any jury panel produced and to declare Section 494.031, V.A.M.S., and Article I, Section 22(b) of the Constitution of Missouri in violation of the rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

HEARING ON DEFENDANT'S AMENDED MOTION TO QUASH JURY PANEL, HELD MARCH 29, 1976 BEFORE THE HONORABLE DONALD B CLARK, JUDGE OF THE CIRCUIT COURT OF MISSOURI, SIXTEENTH JUDICIAL CIRCUIT, DIVISION NO. 7

(DEFENDANT'S EXHIBITS NOS. 1, 2, & 3, LIST OF STATISTICS OF JURORS, WERE MARKED FOR IDENTIFICATION)

MR. HANDLEY: Your Honor, at this time—
THE COURT: Off the record.
(Off the record discussion)

(DEFENDANT'S EXHIBIT NO. 4, PARTIAL TRANSCRIPT OF PROCEEDINGS, WAS MARKED FOR IDENTIFICATION)

THE COURT: Let's go on the record then and get these exhibits in.

MR. HANDLEY: At this time, we would offer Defendant's Exhibit No. 1, which is a table of jurors summoned in Jackson County for service for the month of January, 1976.

Defendant's Exhibit No. 2, a table of jurors summoned in Jackson County for service in Kansas City for the month of February 1976.

And Defendant's Exhibit No. 3, which is a summary of Defendant's Exhibit No. 1 and No. 2.

And Defendant's Exhibit No. 4, which is a Partial Transcript of the Proceedings of *State of Missouri vs Vincent X. Lee*, which, if my memory serves me, took place on the 14th day of November, 1975, before Judge Meyers of Division 14 of this Jackson County Circuit Court, wherein Mr. John Fitzgerald, Mr. Charley Rogers and Mr. Robert J. Kramer were called as witnesses for the movant. And all of whom testified as to work they had done and procedures used in Jackson County to select jurors for service. So I would offer those 1, 2, 3, and 4 at this time.

MR. BELLEMERE: State has no objection, Your Honor, to their being admitted into evidence.

THE COURT: All right, we'll show Defendant's Exhibits 1, 2, 3 and 4 received in support of the defendant's Amended Motion to Quash the Jury Panel.

(DEFENDANT'S EXHIBITS NOS. 1, 2, 3, LIST OF STATISTICS OF JURORS, WERE RECEIVED IN EVIDENCE)

(DEFENDANT'S EXHIBIT NO. 4, PARTIAL TRANSCRIPT OF PROCEEDINGS, WAS RECEIVED IN EVIDENCE)

THE COURT: Is there anything further on that motion?

MR. HANDLEY: No, Your Honor, not at this time.

THE COURT: All right. At this time, the record will reflect that the Court has considered the Amended Motion to Quash the Jury Panel and overrules the same.

MR. HANDLEY: Judge, I would request permission of the Court to withdraw the Exhibits, 1 through 4, at this time.

THE COURT: All right. We'll show the exhibits returned to the defendant's counsel for safekeeping.

DEFENSE EXHIBIT NO. 1, ADMITTED INTO EVIDENCE AT HEARING ON AMENDED MOTION TO QUASH JURY PANEL, MARCH 29, 1976.

TABLE OF JURORS SUMMONED IN JACKSON COUNTY FOR SERVICE IN KANSAS CITY—JANUARY, 1976

WEEK		JURORS SUMMONED		EXCUSED OR DECEASED	DEFERRED	ABSENT	APPEARED FOR SERVICE	
1/5/76	Male	247	(75.5%)	70	19	6	152	(92.7%)
	Female	80	(24.5%)	49	2	17	12	(7.3%)
	Total	327		119	21	23	164	
1/12/76	Male	260	(76.5%)	64	25	24	147	(88.6%)
	Female	80	(23.5%)	48	1	12	19	(11.4%)
	Total	340		112	26	36	166	
1/19/76	Male	245	(76.3%)	71	18	14	142	(87.1%)
	Female	76	(23.7%)	45	0	10	21	(12.9%)
	Total	321		116	18	24	163	
1/26/76	Male	234	(72.0%)	85	12	15	122	(81.9%)
	Female	91	(28.0%)	44	2	18	27	(18.1%)
	Total	325		129	14	33	149	
TOTALS FOR JANUARY 1976	Male	986	(75.1%)	290	74	59	563	(87.7%)
	Female	327	(24.9%)	186	5	57	79	(12.3%)
	Total	1,313		476	79	116	642	

DEFENSE EXHIBIT NO. 2, INTRODUCED INTO EVIDENCE AT HEARING ON AMENDED MOTION TO QUASH JURY PANEL, MARCH 29, 1976

TABLE OF JURORS SUMMONED IN JACKSON COUNTY FOR SERVICE IN KANSAS CITY—FEBRUARY, 1976

WEEK OF		JURORS SUMMONED		EXCUSED DECEASED	DEFERRED	ABSENT	APPEARED FOR SERVICE	
2/2/76	Male	224	(70.9%)	64	26	16	118	(79.7%)
	Female	92	(29.1%)	46	4	12	30	(20.3%)
	Total	316		110	30	28	148	
2/9/76	Male	243	(73.6%)	66	18	23	136	(82.9%)
	Female	87	(26.4%)	48	1	10	28	(17.1%)
	Total	330		114	19	33	164	
2/17/76	Male	120	(67.1%)	35	13	4	68	(81.0%)
	Female	59	(32.0%)	37	1	5	16	(19.0%)
	Total	179		72	14	9	84	
2/23/76	Male	235	(69.9%)	59	19	7	150	(84.7%)
	Female	101	(30.1%)	53	2	19	27	(15.3%)
	Total	336		112	21	26	177	
TOTALS FOR FEBRUARY 1976	Male	822	(70.8%)	224	76	50	472	(82.4%)
	Female	339	(29.2%)	184	8	46	101	(17.6%)
	Total	1,161		408	84	96	573	

DEFENSE EXHIBIT NO. 4, ADMITTED
INTO EVIDENCE AT HEARING
ON AMENDED MOTION TO QUASH,
MARCH 29, 1976.

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, DIVISION 14

STATE OF MISSOURI,
Plaintiff,

-vs-

VINCENT X. LEE,
Defendant.

C-47609

PARTIAL TRANSCRIPT OF PROCEEDINGS

On Friday, the 14th day of November, 1975, the above-entitled cause came on regularly for hearing before the Honorable Robert A. Meyers, Judge of Division 14 of the 16th Judicial Circuit at Kansas City.

HEARING

The State was represented by Mr. Gary Haggerty. The Defendant was represented by his attorney, Mr. Thomas Larson, and present in person.

The following proceedings were had:

THE COURT: Are you ready to proceed?

MR. LARSON: Yes, Your Honor. This morning we'd like to take up Defendant's motion to Quash the Jury Panel. We have two basic allegations in this motion. First of all, that the Missouri Statutes and Constitutional provisions that allow women to excuse themselves from jury service combined with the method of selecting potential jurors in Jackson County results in the disproportionally small number of women being available for jury service; and therefore, denies this defendant or any other the right to have a panel selected from a cross-section of the community. We have some testimony and exhibits connected with that allegation. Also, a second allegation is that the method of selecting potential jurors in Jackson County does not comply with the Section 497.130 of the revised statutes for the reason that the names of jurors that go

into the jury wheel are not selected approximately equally among the voting precincts of the County and in connection with these I'd like to call Mr. John Fitzgerald to the stand, please.

THE COURT: All right.

JOHN R. FITZGERALD,
being sworn by the Clerk, testified as follows:

DIRECT EXAMINATION BY MR. LARSON:

Q State your name, please.

A John R. Fitzgerald.

Q And you are a Jury Commissioner for the Circuit Court of Jackson County, Missouri; is that correct?

A That's right.

Q How long have you held that position?

A Since about February of this year.

Q Mr. Fitzgerald, would you describe for us, briefly, the method by which names are selected in order to send out the official notice and questionnaire for jury service?

A Well, that's done through the computer section and gets taken from the Voter Registration List. The percentage of the total number of voters registered in Jackson County is taken from across the board and the percentage of that total number are sent questionnaires.

Q Now, for the year 1975, do you have an estimate of about how many questionnaires were sent out in Jackson County?

A I do not have the exact number, Mr. Kramer in computer section does. I would say approximately 70,000 as far as I know at the present time.

Q Now, from that list, how many jurors or how many names are selected in order to produce names to go into the jury wheel?

A 25,000 is required by statute, if I'm not mistaken. I think it's the required number.

Q I want to direct your attention to what's marked as Defendant's Exhibit No. 1. Would you tell us what that is?

A That's the computer print-out of the jury wheel for 1975.

Q So, these are names of people who are potentially—can be put into the jury wheel; is that right?

A Well, this is the jury wheel.

Q Yes.
A Okay, thank you. Now, on this list—first of all, does it show the name of the person?
A Yes. They are in alphabetical order.
Q Is there a case that shows the sex?
A Yes, "M" for male and "F" for female.
Q And would you tell us briefly what other information is shown in these records?
A Of course, their middle initial, their birth date, a house number, their address, the city, which we have as a code, to determine where they live and then the Zip Code and then this space here shows the date of last service.
Q Now, this record is made on or about the time the names are actually selected; is that correct?
A Made after October of the preceding year of the year before they are to serve.
Q That is when you do select the names for the jury wheel?
A That's correct.
Q Is this record kept under your custody and control as Jury Commissioner?
A Yes, that's the print-out given to me from the computer section kept under my. . . .
MR. LARSON: We would offer Exhibit 1 at this time, Your Honor.
MR. HAGGERTY: State has no objections.
THE COURT: All right. It will be received.
Q (By Mr. Larson) In order to get a list of potential jurors for a given week, how do you use the list contained in Exhibit 1?
A The presiding Judge designates how many jurors we are going to need for a given week. Then the computer room is given that number and then at random selection, why, the names are selected and a print-out list is made and sent to myself here in Jackson County, and then to the Deputy Jury Commissioner in Independence for the number he needs out there.
Q Let me direct your attention to what's been marked as Defendant's Exhibit No. 2, and would you describe for us what that is?
A This is the jacket. Inside it contains all the—contains the names of the people that actually served, the ones that were summoned. In other words, it's a complete jacket or juries for the week of January 2nd, 19 and 75, of

the people that actually showed, appeared, were paid, and in other words, a complete report of juries for that week.
Q You said January. I believe that says June.
A June, I'm sorry. June of '75.
Q Now, out of this pack marked Exhibit 2 let me show you a computer print-out sheet, that's titled Jurors Summoned for the week of 6/2/75; is that correct?
A That's correct
Q I notice there are various marks on that sheet. Would you describe for us, first of all—first of all, besides the marks, does that show the name and the sex of the people that were summoned?
A That's correct.
Q And it's again, "M" for male and "F" for female?
A That's correct.
Q You have red lines drawn through some of the names. What do the lines indicate?
A Each red line means that juror has not been available for service that week. Either he's been excused, deferred, and did not or—well, did not appear. The check outside here—pencil check actually means he checked in with us on the Monday morning of this and was available to serve.
Q What if there is no mark at all?
A If there is no mark, then the person opposite that, and there is no red line, he didn't show. That's what we more or less classify as a "No show."
Q Now, what is the difference between being deferred and excused?
A Well, if you are being deferred, you are deferred to a later date, for service at a later date.
Q Is that difference noted on your record there?
A Yes, it is.
Q How?
A If there is a red line drawn through it and the date that the person is deferred to is different there—for instance on this one, on number 18 a Mr. William Bard was deferred to 9-2. In other words, he would be reporting in for jury service on the 2nd day of September.
Q Now—
A And goes on through several others.
Q I notice that on the right-hand column of this there are some red letters. What does the "E" mean?
A "E" means he's excused.

Q Okay. What does the "S" mean?

A Well, an "S"—if there is an "S" in there, there ordinarily it's served. But Independence shows a "S" and doesn't give the days. Here in Kansas City we give the number of days. In other words, if there is a number in there, he has served four days.

Q If there is an "S" that means he served, but you don't know how many days?

A Yes. On Independence, on their group they will come in, they will put an "S" and then opposite the "S" they put the number of days he served, but here in Kansas City we just put the number of days he served, but that's superfluous, he served four days or one day.

Q Now also, on the packet marked Exhibit No. 2, do you have a list there of the jurors who actually did report for service on the week of June 2nd, 1975?

A This is the one from Kansas City. We do not have one from Independence. They keep their records out there. This is a list of the actual names, the number of days they served, the mileage that they received, the check number that was issued to them and the total amount of money that was paid to them.

Q Does that show the full name of the jurors?

A Yes.

Q Does it show their sex on that?

A No, it does not.

Q Is it possible to determine their sex by checking their name back against the computer print-out sheet?

A Yes, it would be very easy. All you had to do is check the name back on the computer and then determine whether it's male or female. I mean, the name Eugene or Gene or something like that could be both, you'd have to do it that way, because there is no way on this to determine sex from this list.

Q Is there also a report in this packet that would show the number of "No-shows" by sex?

A Yes, from the Kansas City office we do. Well, it shows the number of—yeah, that failed to report, yes. Both men and women.

Q Okay. Now, again, is this a record that is made at or about the time—that was made on or about June 2nd?

A During the week of June 2nd. It would be the latter part of the week when we have the full statistics for the week as to. . .

Q And the records are produced and maintained during the course of your business as Jury Commissioner?

A That's right.

Q Kept under your custody and control, is that correct?

A They are.

MR. LARSON: We would move for admission of Defendant's No. 2, Your Honor.

MR. HAGGERTY: No objection.

THE COURT: All right. It will be received.

MR. LARSON: Now, Mr. Haggerty, Defendant's Exhibit 3 through 24 are similar records for the weeks of June 9th through the week of November 3rd, 1975, inclusive. Would you be willing to stipulate that these are also business records of the Jury Commissioner?

MR. HAGGERTY: They contain the same information except for different weeks?

THE WITNESS: That's correct.

MR. LARSON: We would offer Defendant's Exhibits No. 3 through 24, Your Honor.

THE COURT: All right. They will be received.

Q (By Mr. Larson) Mr. Fitzgerald, directing your attention to what's been marked as Defendant's Exhibit No. 25, will you tell us what that is, please?

A Yes, this is the computer print-out of the names of the people that have been summoned for jury duty for the week of the 17th of this month. That would be the coming Monday.

Q Does that show the names and the sex of those people?

A It does.

Q Have you, sir, had an opportunity to count the number of females on there as compared to the number of males?

A I have.

Q Would you give us those figures?

A Eighty-eight women out of the total number of 300. Of that 300, eighty-eight are women.

Q Okay. And this is an official record also, as the others you've testified about?

A Yes. It will be used Monday morning.

Q This one does not yet contain the notation of people excused and things of that nature?

A No, we are in the process of now doing that and by

Monday it will—we'll have more information on it by Monday after the jurors have checked in and we have determined who is available.

MR. LARSON: We would offer Defendant's Exhibit No. 25.

MR. HAGGERTY: No objection.

MR. LARSON: Mr. Haggerty, what's been marked as Defendant's Exhibit 26 is a census data compiled by the United States Department of Commerce. Would you be willing to stipulate to that exhibit?

MR. HAGGERTY: Yes.

MR. LARSON: On the State stipulation, Your Honor, we would offer Defendant's Exhibit No. 26, and apologize for the marked up condition of that one.

THE COURT: All right. It will be received.

Q (By Mr. Larson) Let me show you what's been marked as Defendant's Exhibit No. 27. Would you tell us what that is, please?

A This is the official questionnaire notice that's mailed to prospective jurors under the statutes.

Q Is that form prescribed by statute?

A Word to word.

Q At the bottom of the very bottom of that form, is there a place for women to indicate whether or not they wish to serve?

A Yes, this one section here, the Constitution permits women to elect to serve or not to serve as jury women and any woman who elects not to serve will fill out this paragraph and mail this questionnaire to the Jury Commissioner at once. It will not be necessary to answer the other questions. It states, "I elect not to perform jury service," under the signature of the person it's sent to.

Q I'll show you what's been marked Defendant's Exhibit No. 28. Could you tell us what that is?

A This is one of the printed summons sent to all our jurors by mail.

Q On the back of that, is there a similar notation concerning women?

A In a paragraph—let's see, 1, 2, 3, fourth paragraph down, it's printed in red "Women." And the statement "If you do not wish to serve, return this summons to the Judge named on the reverse side as quickly as possible."

Q And both Exhibits 27 and 28 are forms that you furnished to me yesterday; is that correct?

A That's correct.

(The exhibits were handed to Mr. Hagerty.)

MR. HAGGERTY: No objection.

MR. LARSON: We would offer Defendant's Exhibits 27 and 28, Your Honor.

THE COURT: They will be received.

Q (By Mr. Larson) Mr. Fitzgerald, if a juror is sent a questionnaire and fails to return it, what steps if any are taken to either contact your juror or—what is done about that juror?

A Well, in the questionnaire, if the questionnaire is not returned, then his name is automatically as it is stated will automatically be subject to be placed in the wheel. In other words, it's not definite that his name will be in the wheel, but if the questionnaire is not returned to us, then his name is subject to be placed in the possibility of being drawn for a jury wheel.

Q And would men and women who receive such a questionnaire be treated the same way as in such a situation?

A Yes, sir.

Q All right. Now, if the name eventually ends up in the jury wheel and a particular person is sent a summons, what steps, if any, are taken if the person fails to respond to the summons?

A Well, the names of the men are compiled and we send them to Judge Vardeman, his bailiff then tries to check out to determine what was the reason why they did not appear and serve.

Q You said that was the men. What about the women who fail to respond to summonses?

A Due to the fact that, by statute, women are not required, if they don't want to serve, then nothing is done on the women because all they would have to do is express their feeling that they didn't want to serve, so nothing is done.

Q Effectively, if a woman does not want to respond to a summons, her name is taken out of the jury wheel?

A Not taken out of the jury wheel, it's deleted from that week's service.

Q Would she be summoned again?

A No, no juror is summoned twice within one jury wheel.

Q Okay. And any juror that's excused during a particular week whether male or female, does his name go back in the jury wheel or stay out?

A No, it does not.
Q Stays out?
A Uh-huh.
Q All right. Directing your attention back to Exhibit No. 1, which you have described some of the portion of that already, is there any way to tell by looking at that record which voting precinct within Jackson County that the particular person lives in?
A Not to my knowledge.
Q Okay. Mr. Fitzgerald, each week do you personally observe the jurors who report for jury duty?
A Yes, I do. They check in with me every Monday morning personally. They check in with me first of all. I ask their name and address and if there is any change in their name and address, it's noted, then mailed and we place it then in—
Q Over the week do you have opportunity to notice how many men and how many women appear each week?
A Oh yes, yes.
Q Could you give us an approximation based on your experience of how many jurors appear each week on the average?
A How many actual jurors appear?
Q Right.
A Well, actually, I can tell you from each one of our records at the top here. There is a figure there that will tell you the total number that appeared for that week. A hundred sixty-nine appeared that week, actually, to serve. I can't give you a definite figure. Some weeks we call 350 and at the present time we are calling approximately 300. And it varies between the two, but I don't know the percentage. I have never figured the percentage.
Q Mr. Fitzgerald, that's all the questions I have. Thank you, sir.

CROSS-EXAMINATION BY MR. HAGERTY:

Q Mr. Fitzgerald, you indicated, did you not, that the jury wheel as indicated by Defendant's Exhibit No. 1 is compiled in October?
A Yes, that's right, of the year before.
Q All right. And that wheel is comprised of the registered voters in Jackson County; is that right?
A A percentage of them, yes.

Q A percentage of them. And how do you determine that percentage?
A Well, the actual start of it has to go from the computer room. They are the ones that start out with it.
Q All right. And then that list is made up. The jury wheel is made up without regard to whether or not you need a certain percentage of men or women on it; is that right?
A That's right.
Q Randomly selected?
A That's right.
Q So you have no control over the number of men or women?
A No, no.
Q And you have no way of telling from the jury wheel how many— what percentage of women are registered versus what percentage of men are registered; is that right?
A No, no.
Q The questionnaire that you send out and the summons are as the statute requires; is that right?
A That's right.
Q Containing the warning or notice to the women regarding their—that they do have an exemption if they desire to take advantage of it; is that correct?
A That's correct, yes.
Q And if a woman fails to appear for jury service in one particular term she's then put back in. She's subject to be put back in for the next wheel as any other registered voter would be?
A Yes. Of course, the fact is, if she's a registered voter in the following year, why, anybody that's a registered voter, his name is there, and can be chosen at random when we select the questionnaires to be sent out.
Q Requires a selection on her part each time she may be selected in the jury wheel to abstain from jury service?
A That's correct. If she gets a questionnaire, if she doesn't want her name even to be there, all she has to do is send that questionnaire back in and her name would not even be in the prospective—
Q That's only for this particular jury wheel, is that right?
A Yes, for that year. It's done every year.
Q It's very possible that she could have to exercise that same option the next time she's called for jury service?

A That's right. I mean, if she sends it in and says she doesn't—wants to serve, when she gets the summons she still has the right to decline it, because she still has that Constitutional right as far as we're concerned.

MR. HAGGERTY: No further questions.

REDIRECT EXAMINATION BY MR. LARSON:

Q Just one more question. It's still possible, even if the woman answered the summons, if she would report to either you or the court on Monday morning, she could still excuse herself then, couldn't she?

A They do. A lot of them come in and say, "Here's my summons. I don't care to serve." There is no way for us to tell her that she has to. We just accept her summons and note it that she's under the Constitution doesn't require to serve, and we then put it as such.

Q So, if she takes affirmative action by telling you that she doesn't want to serve, then she's off, right?

A Yes, that's right.

Q If she takes no action by simply not showing up, she's also off; is that right?

A Uh-huh, because as the Constitution states—if we called her and said, "Hey, why don't you"—she doesn't want to serve. There would be no other purpose of calling her.

MR. LARSON: I believe that's all the questions I have. Your Honor, all these things marked as exhibits need to be returned to Mr. Fitzgerald. He's agreed that they would be kept intact and we thought we'd take them back there after this hearing, but they'd be available at any time the Court or prosecutor would want to look at them, I'm sure.

THE COURT: All right.

Q (By Mr. Haggerty) I have one question. She's not automatically, because of the fact she's a woman, not automatically kept off the jury wheel unless she asked to be put on? She's kept on the jury wheel as a registered voter regardless of whether she's a female or male; is that right?

A In other words, if her name is selected out of the voter registration to be sent a questionnaire, she then has the right at that time to elect to have her name placed there. It's not necessary that she will actually be on the jury, just that she will be—then also has the right again, if she is placed in the wheel and given a summons, the right to decline. She has two chances to decline, when the questionnaire is sent to her and when the summons is sent to her.

MR. HAGGERTY: I have no further questions.

MR. LARSON: That's all I have.

(The witness was excused.)

CHARLES M. ROGERS,

being duly sworn by the Clerk, testified as follows:

DIRECT EXAMINATION BY MR. LARSON:

Q Would you state your name, please?

A Charles M. Rogers.

Q And are you employed by the Office of Public Defenders?

A Yes, I am.

Q And are you employed there as a law intern?

A Yes, I am.

Q At my direction, Mr. Rogers, have you had an opportunity to examine what has been marked as Defendant's Exhibit 11 on through 23?

A Yes, I have.

MR. LARSON: Your Honor, I'll give you copies of these that are not actually marked as exhibits for your information.

Q Now, let me direct your attention to what's marked here as Defendant's Exhibit No. 29, and what is that titled?

A It's titled Tabulation of Data Obtained from Lists of Jurors Summoned for August of 1975.

Q Is this a document that was prepared by you?

A Yes, it was. It was typed from a handwritten original prepared by me.

Q In order to get these figures that are shown for the week of August 4, 1975, which of these exhibits did you examine?

A I examined Defendant's Exhibit No. 11.

Q Did you count the number of males and females contained in the computer print-out that says Jurors Summoned for the Week of August 4th?

A I counted the number of females and—counted them twice, as a matter of fact, to check myself, and then I obtained the number of males by subtraction.

Q And what other—what's contained in the information columns in this exhibit? Would you describe how you got those numbers? Where it says "Excused," how did you count those?

A "Excused" I went through and those who had been marked with a red line and checked to see if there was a date by the red line which would indicate that they were deferred. If they were, I put them in the deferred column, if there was no date there, I put them in the Excused column.

Q What about the ones not appearing, where did that figure come from?

A Comes from two places. First of all, there is no red line through the name and there is no check mark over at the extreme left-hand side of the print-out next to the name, then they did not appear, and also, you'll see that where that's the situation, there will be over in the column entitled "Sex" there will be an "X" through the letter there, if it's a male or a circle around the letter, if it's a female and those are those who did not appear.

Q On the final column where it says "Appeared for service," where did you arrive at those figures?

A I went through and counted all the females through the sex column which were neither circled as not appearing and where not red lined as deferred or excused. And then, I got the number of males, once again, through subtraction.

Q And the percentages that appear, is that a figure that you computed yourself?

A Yes. I have computed it arithmatically.

Q Now, on the week of August 4th we show on the far right-hand column, 83 people appeared for service and will you tell us the percentages of male and female?

A Twelve percent were female and eighty-eight percent were male.

Q Now, on August 11th the figures that are shown in Exhibit 29, did you arrive at those by doing a similar process with the information contained in Defendant's Exhibit 12?

A Yes, I did. I did that for each week in Exhibits 11 through 23.

Q And so Defendant's Exhibit—taking them in order, Defendant's exhibit 29 starts with which week?

A Starts with the week of August 4th.

Q And that goes through which week?

A Goes through the week of August 25th.

Q The exhibit marked No. 30 starts with which week?

A The week of September 1st.

Q And goes through which week?

A The week of September 29th.

Q And Defendant's Exhibit 31 starts with which week?

A The week of October 6th and goes through the week of October 27th.

Q And for each of these weeks that you have made calculations, those calculations are made from these previously marked exhibits that would bear the same weekly data; is that correct?

A That's correct.

MR. LARSON: We'd offer Defendant's Exhibit 29, 30, and 31 at this time, Your Honor, as—primarily as an assistance to the Court and as a compilation of the data contained in the exhibits. We have not made the compilations for the month of June and July, simply because we haven't had time to do so yet.

I have no further questions.

MR. HAGGERTY: No questions.

MR. LARSON: Thank you.

(The witness was excused.)

ROBERT J. KRAMER,

being first duly sworn by the Judge, testified as follows:

MR. LARSON: Your Honor, were Exhibits 29, 30, and 31 received?

THE COURT: Was there any objection to these exhibits?

MR. HAGGERTY: I had no objections.

THE COURT: All right. They will be received.

DIRECT EXAMINATION BY MR. LARSON:

Q State your name.

A Robert J. Kramer.

Q Mr. Kramer, my name is Tom Larson. I represent the defendant. I spoke with you by phone previously. Would you state what your occupation is, please?

A Director of Data Processing for the 16th Judicial Circuit.

Q In that capacity are you responsible for selecting the names of people to whom official notice and questionnaires for jury service are sent?

A Responsible for the actual procedure. The actual responsibility lies with the Jury Commissioner.

Q And you say you are responsible for the procedure?

A Carrying out the procedures.

Q Okay. Would you describe for us the procedure that you use in order to ascertain the names of people to whom questionnaires are sent?

A Okay. We select approximately one-fourth of the registered voters in Jackson County. There is actually two different procedures that are used. The Kansas City Voter Registration Roles is an automated system and we acquire a magnetic tape of the registered voters from Kansas City, which is in a ward and precent sequence. From that we select every fourth individual.

The Independence procedure: The information is captured directly from the manual records that are kept at that location and the same procedure, only a manual capture of the data from the original books.

Q Okay. You said this is done—these lists are kept by ward and precinct. What steps, if any, are taken to determine that the names selected are selected approximately equally from the various voting precincts?

A Well, the procedure—both files that we select from are in ward and precinct sequence, and the first year we used this procedure we started with the first name and each fourth name thereafter. And then each following year we would—the following year we would start with the second name and each fourth name thereafter, and consequently getting a proportionate number of individuals by ward and precinct.

Q Now, approximately how many names were selected for the receipt of questionnaires for this year, for 1975?

A Approximately 70,000.

Q The next step, I take it, was the questionnaire mailed out to 70,000 people; is that correct?

A Yes, sir.

Q When was that done?

A I don't recall the exact date.

Q Approximately.

A The latter part of September.

Q Of what year?

A Seventy-four.

Q And these questionnaires are to be mailed back in, is that right?

A Yes, sir.

Q What is done with the questionnaires in terms of sorting them after they are mailed in?

A They are sorted by—depending on the individual's

response to the questionnaire itself. Certain individuals may elect serve, others are exempt, some because of age, sex, professional status, and so forth. These are separated.

Q The ones that are separated because of these exemptions, are they what you classify as "Bad questionnaires"?

A Only for simplification purposes, yes.

Q Do you have any estimate of how man "Bad questionnaires" were received from the batch that you sent out in September of '74.

A The actual wheel that is in current use is approximately 30,000 (sic) and consequently, there were roughly 40,000 in this category.

Q Now, the "Bad questionnaire" category does include those people that exempted themselves because of sex; is that correct?

A Yes, sir.

Q Do you have any records that would show how many exemptions for sex were taken on the questionnaires?

A No, sir.

Q Were those questionnaires saved from last year?

A No.

Q Now, you have in front of you a document marked Defendant's Exhibit No. 1, and that's been identified by Mr. Fitzgerald as the jury wheel for 1975; is that correct?

A It is a printed listing of the jury wheel, yes, sir.

Q All right. Now, would you examine that list and tell us if there is any way to determine what voting precinct these people live in, just by looking at that record?

A No, sir.

Q Would you describe for us what steps, if any, are taken to determine that that list is made up of people selected approximately equally from the various voting precincts in Jackson County?

A Okay. To the best of my ability, the portions of the statute that refers to wards and precincts refers to the actual questionnaires that are to be sent and not necessarily that the wheel has to be—the wheel has to contain a percentage of people by ward and precinct.

Q Do I understand your testimony to be then, that after you have sent out the questionnaires in accordance with the procedure you described, you do not take any further affirmative steps to see that the jurors are divided equally among precincts?

A That's correct.

Q All right. Are you in the process now of receiving back questionnaires to make up a jury wheel for 1976?

A Yes, sir.

Q And are you also in the process of sorting out the bad questionnaires?

A Yes, sir.

Q Do you have any approximation of how many questionnaires you have received back?

A Not at this point, no.

Q Would it number in the thousands?

A Yes, sir.

Q Would it also be a fair statement to say there are thousands of bad questionnaires?

A Yes, sir.

Q And the only way to sort those out is to go through each one and decide whether persons exempted themselves for sex or some other reason?

A Yes, sir. It's a manual, individual basis.

MR. LARSON: I have no further questions, sir.

CROSS-EXAMINATION BY MR. HAGGERTY:

Q Mr. Kramer, you said if I understand, that the initial 70,000 questionnaires that were sent out, the names are selected from the Voter Registration Roles, either here in Kansas City or out in the Independence area, and they are made out—

A Both.

Q Pardon?

A Both.

Q All right. And you use a random process of one of every fourth name to select those questionnaires; is that right?

A Yes, sir.

Q The idea being that eventually, four wheels, you will then have had every name who is on the—

A Theoretically, yes.

Q Theoretically, every man who is on the list of registered voters has been sent a questionnaire regarding jury service; is that right?

A Theoretically, but in practice it's not true, because there are people continually adding to the list, people continually being deleted from the Voter Registration List, which puts everybody in a new—

Q But, in your opinion as being in charge of programming for the County, in this regard, is that the best way

possible to insure that you do get the questionnaires sent out in the equal proportion to the voting precincts as possible in this County?

A Yes.

MR. LARSON: I object to the question and response, Your Honor, as calling for a conclusion, now he's asking him if he's fulfilling the terms of the statute. I have no question Mr. Kramer is doing a good job, but I don't think he's qualified to say whether that meets the terms of the statute.

MR. HAGGERTY: Your Honor, he's in charge of setting the programs for selecting the—

THE COURT: Rephrase the question.

Q (By Mr. Haggerty) Is it your opinion, the methods that you are presently using, that is of selecting every fourth name from either the magnetic records that are kept in the Kansas City office of the Board of Election Commissioners or the actual physical records out in Independence office, that that method of selecting every fourth name is the best possible program that you could establish to insure that the questionnaires are sent out equally to members of each voting precinct?

MR. LARSON: Just a moment, Mr. Kramer. My objection, Your Honor, is not subject for opinion testimony by this witness.

THE COURT: I'll overrule the objection.

A The both lists are in order by ward and precinct, and consequently if you select each—every fourth individual, it will be proportionate by ward and precinct.

Q So your answer then, is, yes?

A Yes, sir.

MR. HAGGERTY: I have no further questions.

REDIRECT EXAMINATION BY MR. LARSON:

Q Mr. Kramer, after the bad questionnaires are sorted out, are any efforts made to determine where these people that are exempted live in terms of their ward or precinct?

A No, sir.

Q Are any efforts made to determine whether the people left over, the ones not exempted, where they live in terms of ward or precinct?

A No, sir.

Q When you sort out the bad questionnaires, is some step taken to delete that particular name from the computer?

A Yes, sir.

Q How is that done?

A Well, it is actually deleted from our automated wheel.

Q Now, does that process leave any record of why the deletion was made? In other words, does it show whether it was made because of sex or age or some other reason?

A No, sir.

Q So in other words, there is no way to retrieve from the computer the nature of the exemption that led to the name being deleted?

A No, only through manual process baking up to the exact questionnaire itself.

MR. LARSON: I have no further questions.

RECROSS-EXAMINATION BY MR. HAGGERTY:

Q It's possible, is it not, some of the bad—what you call bad questionnaires, that is questionnaires where people ask to be excused for one reason or another, would involve more than one reason as its basis for excuse; is that right? For instance, a person could be excused because they are a woman—female and over 65, or female and also are involved in professions that would be exempted; is that correct?

A Yes, sir.

Q It would be difficult for you to say exactly what was the reason for the excuse just from looking at the fact that if a person is a woman she's excused; is that right?

A Yes, sir.

Q May be more than one reason why a female is excused from jury service; is that right?

A Yes, sir.

MR. HAGGERTY: All right. No further questions.

MR. LARSON: Thank you, Mr. Kramer.

(The witness was excused.)

HEARING ON DEFENDANT'S MOTION FOR NEW TRIAL HELD APRIL 21, 1976

(DEFENDANT'S EXHIBIT NO. 1, GENERAL POPULATION CHARACTERISTICS OF MISSOURI, WAS MARKED FOR IDENTIFICATION)
(DEFENDANT'S EXHIBIT NO. 2, SUMMONS FOR JURY SERVICE, WAS MARKED FOR IDENTIFICATION)
(DEFENDANT'S EXHIBIT NO. 3, OFFICIAL NOTICE AND QUESTIONNAIRE FOR JURY SERVICE, WAS MARKED FOR IDENTIFICATION)
(DEFENDANT'S EXHIBIT NO. 4, TABULATION OF DATA OBTAINED FROM LISTS OF JURORS SUMMONED FOR MARCH, 1976, WAS MARKED FOR IDENTIFICATION)
(DEFENDANT'S EXHIBIT NO. 5, MASTER PRINT-OUT OF 1976 JURY WHEEL, WAS MARKED FOR IDENTIFICATION)

THE COURT: All right. The record should reflect in Case Number C–48011, *State vs Billy Duren,* the cause was tried before a jury which, on March 31, 1976, returned verdicts of guilty as to Count I and Count II, and determined the sentence on each count to be life.

The defendant was granted 20 days in which to file a motion for new trial. That motion was filed on April the 14th, 1976, timely.

The Court has set a hearing this morning for consideration of the motion for new trial and such additional evidence as the defendant may wish to offer in support of that motion.

MR. LARSON: Your Honor, in support of the first allegation of the motion concerning the quashing the jury panel, we'd like to call Mr. John Fitzgerald to the stand, please.

JOHN FITZGERALD,

having been duly sworn by the deputy court administrator, testified as follows:

DIRECT EXAMINATION BY MR. LARSON:

Q State your name, please, sir.

A John R. Fitzgerald.

Q And what is your position?

A I am Jury Commissioner for the Jackson County Circuit Court, of the 16th Judicial Circuit, State of Missouri.

Q Mr. Fitzgerald, let me show you what's been marked Defendant's Exhibit 5, and would you tell us what that is?

A This is the Jury Wheel that we select jurors from for the year of 1976.

Q Looking at that record, can you determine by looking at this record whether the people listed here are male or female?

A You can determine itby the heading "Sex," and you go over and "F" is for female and "M" is for male.

Q And is this the list that is being used during this calendar year to select jurors for jury service?

A It is.

MR. LARSON: Mr. Bellemere, would you stipulate this is the official record of Jackson County Circuit Court?

MR. BELLEMERE: I will.

MR. LARSON: I would offer Defendant's 5, Your Honor.

THE COURT: It will be received.

(DEFENDANT'S EXHIBIT NO. 5, MASTER PRINT-OUT OF 1976 JURY WHEEL, WAS RECEIVED IN EVIDENCE)

DEFENDANT'S EXHIBIT NO. 6, JURY PACKET OF JURY INFORMATION FOR THE WEEK OF MARCH 29, 1976, WAS MARKED FOR IDENTIFICATION)

Q (By Mr. Larson) Mr. Fitzgerald, show you what's been marked Defendant's Exhibit 6, and would you identify that please.

A This is our folder of our records kept for the week of March the 29th, for jurors summoned for Kansas City and Independence and all the records of trial held pursuant to that week, the actual jurors that did appear, those that did not appear and those that served.

Q By examining the records in that packet, can you determine the sex of the names of the people that are listed there?

A Yes, same way as in the Jury Wheel. On the print-out on the top there, where it titled, "Last Name, First Name, Middle Initial, Sex," and determines "M" for male and "F" for female.

Q If a person is excused, what does that mean?

A Well, they are excused either for this selection of service for this week.

Q If a person is deferred, what does that mean?

A Means he's deferred to a later date which is—means that he cannot be—he's not serving that week, but he cannot

be deferred for longer than a 90-day period by statute. But it is determined, the exact date, it's written in what date he is deferred to.

Q By examining the document you now have in your hand, how do you determine which people actually appeared for service during the week of March 29th?

A On the last side column there is a handwritten "S.O." and a figure, which gives the number of days they served. "S" for "service" and the other two digits are for the number of days. Otherwise—like Anderson, Earl, here, S.O. 4, and the last column means that that man served for four days.

Q Mr. Fitzgerald, do you keep similar jackets of information for each jury week of the year?

A Yes, for every week that we have a jury this record is kept and compiled.

MR. LARSON: Your Honor, I believe prior to the trial of this case, we had entered some exhibits that showed tabulations of information from the week—jury jackets for each week in the month of January and each week in the month of February. And those were entered into evidence by stipulation as Defense Exhibits 1 and 2.

Now, Mr. Bellemere, Defense Exhibit 4, I would, if you would be willing to stipulate to that, that reflects similar tabulations for the weekly jury packets for the month of March.

MR. BELLEMERE: I'd like to ask, on Exhibit 4 there, is that a tabulation made by you or by Mr. Fitzgerald?

MR. LARSON: It's a tabulation made by a law intern in the Public Defender's Office; it was done in Mr. Fitzgerald's office.

MR. BELLEMERE: I'll stipulate that's a tabulation made by your law intern using the records of Jackson County.

MR. LARSON: And we would offer it on that basis, Your Honor.

THE COURT: It will be received.

(DEFENDANT'S EXHIBIT NO. 4, TABULATION OF DATA OBTAINED FROM LISTS OF JURORS SUMMONED FOR MARCH, 1976, WAS RECEIVED IN EVIDENCE)

MR. LARSON: We would also offer defendant's 6.

MR. BELLEMERE: Prior to that going into evidence, I'd like to ask one question.

MR. LARSON: Certainly.

MR. BELLEMERE: Mr. Fitzgerald, in that packet that has heretofore been marked and identified by you as State's Exhibit—or Defendant's Exhibit 6, there are markings on the forms that you have that show people were either deferred or excused, is that right?

THE WITNESS: That's correct.

MR. BELLEMERE: And is there any indication of why those people were either deferred or excused on your records?

THE WITNESS: No.

MR. BELLEMERE: I have no objection to that exhibit being admitted into evidence.

THE COURT: The exhibit will be received.

(DEFENDANT'S EXHIBIT NO. 6, JURY PACKET OF JURY INFORMATION FOR THE WEEK OF MARCH 29, 1976, WAS RECEIVED IN EVIDENCE)

MR. LARSON: In connection with these two exhibits, that have been received, Number 5 and Number 6, on this motion, we would request that those be returned to Mr. Fitzgerald's custody, it's necessary for him to keep those.

THE COURT: We'll show the exhibits are returned to Mr. Fitzgerald.

Q (By Mr. Larson) Mr. Fitzgerald, let me show you what's marked as Defense Exhibit 2. Would you tell us what that is?

A This is the—a copy of a jury summons that is mailed out approximately 30 days prior to the time that they are required to report either to Kansas City or Independence for service.

Q Is that a standard form?

A It is a standard form.

Q And would every juror who receives a summons receive one that is like this one?

A Yes, sir.

Q Show you what's marked Defense Exhibit 3, and would you tell us what that is, please.

A This is the Official Notice of Questionnaire that is sent to prospective jurors in October of the year prior to the making of the Jury Wheel.

Q All right. Approximately how many of those are sent out in October?

A Oh, I would say approximately 25 per cent of the registered voters I think it numbers somewhere between 60 and 70 thousand.

Q Are those sorted after they are received in your office?

A They are sorted in the computer section by employees when they are received back, if they are received back. Some are not received back. But the notification is, it states here that if they are not received, they are subject to being called in the following year.

Q All right.

MR. BELLEMERE: Mr. Fitzgerald, as it relates to Defense Exhibit 3, are these exhibits, after they are prepared by prospective jurors and sent back to the Jackson County Jury Commissioner, are they kept; in other words, do you have, for the year 1976, all the exhibits that are similar to Defendant's Exhibit 3 in your custody showing what jurors said in relation to the specific questions that were asked on this form?

THE WITNESS: They are sent back and they are in the Court Administrator's Office. I do not have them personally under my control at the present time. But they are stored in the Court Administrator's Office, which—where I am part—

MR. LARSON: Excuse me, Mr. Fitzgerald. I think the record should show, Your Honor, that my office now has all of those questionnaires that were sent out in October and September of 1975 for the '76 Jury Wheel, pursuant to an order that we obtained from Judge Vardeman. They are in our custody now.

THE COURT: Well, it's my understanding, gentlemen, that the—that those are normally discarded.

THE WITNESS: After they have come back, they are ordinarily discarded, Judge. As Mr. Larson has stated, they came back into our office and they by order of the Presiding Judge, on a request from the Public Defender's Office to go through these, these were saved for that purpose, but beyond the year's purpose, I mean, they would be destroyed. We would not have any record beyond the year. I mean for '76, we had them and we were compiling the wheel and therefore, after they were used and the wheel was compiled, those records would be destroyed. We would have no record of them from then on.

Q (By Mr. Larson) Okay. And this Notice and Questionnaire Form is a form that's prescribed by statute, is that right?

A It is definitely, that and that only, that's the only questions that can be asked. And it's definitely stated in the statute.

MR. LARSON: Offer Defendant's 2 and 3, Your Honor.

MR. BELLEMERE: I have no objection.

THE COURT: They'll be received.

(DEFENDANT'S EXHIBIT NO. 2, SUMMONS FOR JURY SERVICE, WAS RECEIVED IN EVIDENCE)

(DEFENDANT'S EXHIBIT NO. 3, OFFICIAL NOTICE AND QUESTIONNAIRE FOR JURY SERVICE, WAS RECEIVED IN EVIDENCE)

Q (By Mr. Larson) Now, a couple of more questions, Mr. Fitzgerald. If a person receives a summons and fails to appear on the week that he was summoned for, what happens?

A Well, the name is taken down as a no-show, and through either my office or the Presiding Judge's Office, he is called and asked for what reason or to determine what reason he did not show for service and everything and the determination by the Presiding Judge as to what can be, should be done about his not showing for jury service.

Q Is the same procedure followed if a woman fails to answer a summons?

A Because of the statutes and everything, we are not—we do not compel women to appear.

Q If a woman fails to return a questionnaire, what happens?

A Her name goes in the wheel if she fails to actually return the questionnaire. Her name goes in the wheel.

Q But if she failed to appear at any later time, would anything be done?

A No.

Q All right.

MR. LARSON: I believe that's all the questions I have, thank you, sir.

CROSS-EXAMINATION BY MR. BELLEMERE:

Q Because a woman would fail to appear, you have no knowledge of what reason she would use, whether it was that she couldn't get there then or whether or not she desired not to serve?

A That's right. We have no knowledge whatsoever. If she—she could call in and say she didn't want to serve or

what, but we have no knowledge of that and we keep no records of it whatsoever.

Q And your file follows the law as its prescribed by statute.

A That's correct.

Q And that statutory law makes the allowance for women to do the things that you have testified to today to the Court.

A That's correct, yes.

MR. BELLEMERE: I have nothing further.

MR. LARSON: One more thing. If a woman appears on a Monday morning pursuant to a summons and tells you that she does not want to serve, do you ask her any other questions about why?

THE WITNESS: No, sir. All she states, she does not want to serve, we pick up her jury summons, mark her off the list as being excused and her summons then is—she's an excused woman, a female, and therefore nothing else—

MR. LARSON: All right. Thank you, sir.

THE COURT: One further question, Mr. Fitzgerald. I don't know whether this was covered or not, but to have the record complete, in making the selection of the list of names to be circularized in October with the questionnaire form which you have described, I understand that you use the list of registered voters, is that right?

THE WITNESS: That's correct.

THE COURT: Now, in selecting, you don't use the entire list.

THE WITNESS: We go through 25 per cent of the list on a computer basis.

THE COURT: Right.

THE WITNESS: Mr. Kramer, in the computer section.

THE COURT: You do that on a random selection.

THE WITNESS: Correct.

THE COURT: Now, in that process, is there any attempt made to select a greater or lesser number of males or females?

THE WITNESS: No determination whatsoever, as far as I know.

THE COURT: That's all.

MR. LARSON: I have Mr. Kramer here that can testify about that.

THE COURT: Thank you, Mr. Fitzgerald.

MR. LARSON: Thank you, Mr. Fitzgerald.

(Witness excused)

THE COURT: You want to come up, Mr. Kramer, you're going to have—

MR. LARSON: Could I have just a minute to step across the hall? I think I have got a problem with some arraignments over here. I don't know if we have got somebody to cover it or not. I just want to tell Judge Moore. I'll be right back.

THE COURT: You want to come forward, Mr. Kramer.

ROBERT KRAMER,

having been duly sworn by the deputy court administrator testified as follows:

DIRECT EXAMINATION BY MR. LARSON:

Q Would you state your name, please.

A Robert J. Kramer.

Q And what is your position?

A Director of Data Processing.

Q In that position, Mr. Kramer, are you responsible for selecting names of persons in Jackson County to whom Notice of Questionnaire Forms for Jury Service are sent?

A Yes, sir?

Q And how do you do that?

A It's done on an annual basis. We utilize the voter registration rolls for Kansas City and Jackson County. We select from those two lists one-fourth of the voter registration rolls, and I may correct one statement. The selection is not done on a random basis. The selection is done—the lists are in ward and precinct sequence and we select every fourth name starting at the beginning and going through the list. Each year we're—starting selection number varies. We start the first year that we did this particular process, started with the first record and every fourth record through the voter registration rolls, capturing one-fourth of the voter registration rolls from that. From that one-fourth, we send out approximately 60 to 70 thousand jury questionnaires. The responses from those questionnaires is used in building a jury wheel that we use for a period of approximately one year.

Q Now, when those questionnaires are mailed back to the Jury Commissioner's Office, are they sorted under your direction?

A Yes, sir.

Q And is it, at that time, that you determine which of those are what you call bad questionnaires?

A Yes, sir.

Q Would you tell us what a bad questionnaire is?

A Well, there's several categories. Individuals over 65 years of age can elect not to serve. Women can elect not to serve. There is several categories on the questionnaire itself that some cat—some categories it is at the individuals option whether he wants to serve or not. Some excluded because of profession, is one.

Q All right. So, if I understand you, some people read over these questionnaires and they put aside the ones that show on their face some reason under statute why the person would not serve, is that right?

A Yes, sir.

Q And after you have gone through that sorting process, is any record kept of the reason why people would exclude themselves?

A No, sir.

Q All right. And as Mr. Fitzgerald said, I take it, these questionnaires are normally thrown away after you are through with them, is that right?

A Yes, sir.

Q When you select the names of people to send out the questionnaires in the fall, do you use any kind of public record besides the voter registration list for Jackson County?

A No, sir.

Q Okay. Is that because of the statute or because of any other reason or do you know?

A It's by direction of the Court Administrator.

Q All right. And you have never been directed to use any other types of records besides that?

A That's correct.

Q Okay.

MR. LARSON: That's all the questions I have.

CROSS-EXAMINATION BY MR. BELLEMERE:

Q Mr. Kramer, you heard the question the Judge asked Mr. Fitzgerald as related to this 25 per cent figure and whether or not any effort is made to get more of one sex than another sex in the 25 per cent, did you not?

A Yes, sir.

Q Is there any effort made to get more of one sex than another on a jury panel? I mean, in other words, not the jury panel, the jury wheel. When this selection has gone out, is there any action on your part that causes you to try and get more of one sex than another sex?

A No, it's just the luck of the draw. As I say, we select every fourth record and the records are in ward and precinct sequence so whether they are male, female, or whatever, whatever is the fourth record that we're selecting, that's the one that we select.

Q And each year, you change the number that you started with the year before.

A Yes, sir.

Q So your list is not the same. All right.

MR. BELLEMERE: I have no further questions.

THE COURT: Thank you, Mr. Kramer, you are excused.

(Witness excused)

MR. LARSON: That's all.

One other exhibit, Your Honor, which is marked Defense Exhibit 1, it's simply a Xerox copy of Commerce Department Census Data. Would you be willing to stipulate to that, Mr. Bellemere? The purpose of it is to show the breakdown by sex of the population of Jackson County.

MR. BELLEMERE: I'll stipulate that—what exhibit number?

MR. LARSON: Exhibit 1.

MR. BELLEMERE: I'll stipulate Exhibit 1 appears to be a General Population Characteristics of Missouri. It says 1970 Census of Population. I'll stipulate that that can be admitted into evidence.

MR. LARSON: I would offer Defendant's Exhibit 1.

THE COURT: It will be received.

(DEFENDANT'S EXHIBIT NO. 1, GENERAL POPULATION CHARACTERISTICS OF MISSOURI, WAS RECEIVED IN EVIDENCE)

* * *

THE COURT: Very well. Gentlemen, the points noted in the Motion for New Trial, as Mr. Larson has observed, were previous considered in the composition of the jury panel, this is a matter controlled by statute and the Court does not consider it appropriate at this time to sustain the motion on that basis and make that adjudication of the statute but would leave that for some higher court if found appropriate.

* * *

Consequently, for the reasons stated, the defendant's Motion for New Trial is overruled.

EXCERT FROM DEFENDANT'S EXHIBIT NUMBER 1, INTRODUCED INTO EVIDENCE AT HEARING ON MOTION FOR NEW TRIAL

(From U.S. Department of Commerce Publication - 1970 Census of Population)
(General Population Characteristics--Missouri)

Table 35. **Age by Race and Sex, for Counties: 1970**—Continued

[For minimum base for derived figures (percent, median, etc.) and meaning of symbols, see text]

Counties	1970 population							1960 population	1970 population							1960 population
	All races			White		Negro			All races			White		Negro		
	Total	Male	Female	Male	Female	Male	Female		Total	Male	Female	Male	Female	Male	Female	
	HOWARD								**HOWELL**							
All ages	**10 561**	**5 107**	**5 454**	**4 617**	**4 922**	**479**	**519**	**10 859**	**23 521**	**11 411**	**12 110**	**11 311**	**11 997**	**20**	**27**	**22 027**
Under 1 year	140	68	72	61	60	7	11	186	353	189	164	187	164	–	–	429
1 year	144	72	72	65	66	6	6	190	342	185	157	183	157	–	–	430
2 years	135	60	75	51	61	9	14	177	320	148	172	148	169	–	–	410
3 years	136	68	68	59	55	9	13	187	322	168	154	167	153	–	1	437
4 years	150	86	64	73	57	13	7	200	350	158	192	156	191	–	–	452
5 years	163	86	77	70	69	15	8	198	352	176	176	176	173	–	1	420
6 years	175	101	74	83	61	18	13	199	403	198	205	193	201	–	1	457
7 years	177	97	80	80	66	17	13	202	406	215	191	214	190	–	–	472
8 years	189	95	94	87	81	8	13	174	452	232	220	232	217	–	–	434
9 years	173	87	86	73	77	14	9	169	458	220	238	217	234	–	–	422
10 years	182	90	92	81	80	9	11	189	481	251	230	248	225	1	2	436
11 years	189	102	87	87	79	14	8	177	472	238	234	237	231	1	1	453
12 years	178	90	88	80	76	10	12	182	473	240	233	237	231	1	1	478
13 years	190	96	94	80	79	16	15	182	483	265	218	264	215	–	1	437
14 years	194	91	103	81	95	9	8	166	528	292	236	289	236	–	–	403
15 years	197	101	96	86	86	15	9	148	443	228	215	226	214	1	–	392
16 years	181	93	88	80	79	13	9	159	466	247	219	244	217	1	1	452
17 years	182	101	81	88	69	13	12	152	444	215	229	214	228	–	–	407
18 years	264	132	132	122	123	9	9	261	367	172	195	172	191	–	1	285
19 years	291	134	157	127	148	7	8	261	321	164	157	163	157	–	–	226
20 years	293	135	158	125	148	8	10	225	273	118	155	116	153	1	1	220
21 years and over	6 638	3 122	3 516	2 878	3 207	240	301	6 875	15 012	7 092	7 920	7 028	7 850	14	16	13 475
Under 5 years	705	354	351	309	299	44	51	940	1 687	848	839	841	834	–	1	2 158
5 to 9 years	877	466	411	393	354	72	56	942	2 071	1 041	1 030	1 032	1 015	–	2	2 205
10 to 14 years	933	469	464	409	409	58	54	896	2 437	1 286	1 151	1 275	1 138	3	5	2 207
15 to 19 years	1 115	561	554	503	505	57	47	981	2 041	1 026	1 015	1 019	1 007	2	2	1 762
20 to 24 years	963	493	470	467	437	23	31	721	1 287	586	701	579	694	3	2	1 050
25 to 29 years	475	238	237	228	218	9	17	404	1 233	584	649	581	641	–	–	1 081
30 to 34 years	421	200	221	182	192	17	28	510	1 174	561	613	556	609	–	–	1 163
35 to 39 years	431	198	233	183	216	14	17	514	1 212	584	628	581	624	–	–	1 283
40 to 44 years	505	263	242	244	219	19	23	554	1 310	625	685	621	680	–	3	1 349
45 to 49 years	544	254	290	235	262	19	28	628	1 353	638	715	634	705	2	2	1 274
50 to 54 years	526	253	273	236	248	17	24	624	1 400	676	724	670	716	4	5	1 259
55 to 59 years	601	287	314	260	291	27	23	642	1 360	644	716	637	709	1	1	1 178
60 to 64 years	593	285	308	266	283	19	25	618	1 404	655	749	644	742	3	3	1 065
65 to 69 years	541	240	301	220	268	20	32	608	1 241	608	633	600	630	2	–	1 012
70 to 74 years	475	216	259	188	231	28	28	515	921	427	494	422	490	–	–	883
75 to 79 years	372	155	217	140	198	15	18	407	683	312	371	311	368	–	1	606
80 to 84 years	267	100	167	87	157	13	10	213	444	199	245	197	244	–	–	324
85 years and over	217	75	142	67	135	8	7	142	263	111	152	111	151	–	–	188
Under 18 years	3 075	1 584	1 491	1 365	1 296	215	191	3 237	7 548	3 865	3 683	3 832	3 646	5	9	7 821
62 years and over	2 232	961	1 271	864	1 162	97	107	2 255	4 424	2 054	2 370	2 029	2 353	4	2	3 632
65 years and over	1 872	786	1 086	702	989	84	95	1 885	3 552	1 657	1 895	1 641	1 883	2	1	2 993
Median age	32.5	29.4	35.4	30.0	36.1	21.8	30.6	35.3	34.3	33.0	35.5	33.0	35.5	50.0	42.5	32.4
	IRON								**JACKSON**							
All ages	**9 539**	**4 642**	**4 897**	**4 604**	**4 857**	**24**	**18**	**8 041**	**654 558**	**309 421**	**345 137**	**254 457**	**283 141**	**52 966**	**59 901**	**622 732**
Under 1 year	180	91	89	91	88	–	–	145	11 248	5 678	5 570	4 423	4 249	1 214	1 281	14 843
1 year	159	86	73	85	73	–	–	156	10 428	5 360	5 068	4 187	3 968	1 137	1 079	14 627
2 years	154	63	91	62	90	1	1	152	9 823	4 913	4 910	3 788	3 808	1 081	1 068	14 304
3 years	183	97	86	97	86	–	–	145	10 492	5 337	5 155	4 197	3 932	1 115	1 185	13 848
4 years	175	95	80	93	80	2	–	160	11 087	5 617	5 470	4 326	4 154	1 252	1 286	13 547
5 years	173	88	85	88	85	–	–	140	11 901	5 983	5 918	4 666	4 559	1 344	1 324	13 222
6 years	191	91	100	91	99	–	–	156	12 376	6 368	6 008	4 903	4 619	1 419	1 349	12 352
7 years	172	89	83	88	82	–	1	148	12 873	6 522	6 351	5 051	4 878	1 432	1 441	12 053
8 years	194	105	89	105	89	–	–	157	13 101	6 631	6 470	5 117	5 010	1 476	1 417	11 592
9 years	170	92	78	91	78	–	–	136	13 417	6 886	6 531	5 264	5 026	1 588	1 459	10 553
10 years	189	99	90	99	89	–	1	158	13 881	6 981	6 900	5 350	5 203	1 597	1 647	10 468
11 years	195	104	91	102	91	1	–	180	13 167	6 774	6 393	5 174	4 899	1 556	1 458	10 346
12 years	175	91	84	90	83	1	–	183	13 201	6 742	6 459	5 272	4 933	1 434	1 487	10 574
13 years	177	90	87	88	86	2	–	179	12 785	6 491	6 294	5 104	4 818	1 345	1 449	10 335
14 years	195	93	102	93	100	–	1	156	12 583	6 412	6 171	5 033	4 843	1 339	1 298	7 738
15 years	167	91	76	89	76	1	–	179	12 116	6 126	5 990	4 838	4 680	1 248	1 267	7 576
16 years	184	110	74	107	74	3	–	160	11 489	5 735	5 754	4 589	4 527	1 106	1 189	7 768
17 years	160	74	86	73	83	1	3	151	11 189	5 706	5 483	4 642	4 326	1 030	1 124	7 840
18 years	115	67	48	66	47	1	1	135	10 634	5 069	5 565	4 112	4 494	920	1 037	7 319
19 years	120	51	69	50	69	1	–	85	9 680	4 229	5 451	3 401	4 384	802	1 033	6 906
20 years	100	39	61	39	61	–	–	76	9 585	3 887	5 698	3 133	4 604	726	1 054	7 108
21 years and over	6 001	2 836	3 165	2 817	3 148	10	10	4 904	407 502	185 974	221 528	157 947	187 227	26 805	32 969	397 813
Under 5 years	851	432	419	428	417	3	1	758	53 078	26 905	26 173	20 921	20 111	5 799	5 899	71 169
5 to 9 years	900	465	435	463	433	–	1	737	63 668	32 390	31 278	24 941	24 092	7 259	6 990	59 772
10 to 14 years	931	477	454	472	449	4	2	856	65 617	33 400	32 217	25 933	24 696	7 271	7 339	49 461
15 to 19 years	746	393	353	385	349	7	4	710	55 108	26 865	28 243	21 582	22 411	5 106	5 650	37 409
20 to 24 years	599	266	333	265	331	–	–	357	51 457	22 550	28 907	19 069	24 002	3 300	4 700	38 382
25 to 29 years	606	299	307	299	306	–	–	354	46 451	22 456	23 995	18 942	19 784	3 317	4 009	41 157
30 to 34 years	495	240	255	239	253	1	2	383	37 648	18 416	19 232	15 393	15 581	2 860	3 471	43 157
35 to 39 years	456	245	211	244	209	–	1	417	35 995	17 397	18 598	14 598	14 999	2 690	3 446	43 990
40 to 44 years	460	227	233	224	232	1	–	425	38 729	18 670	20 059	15 743	16 452	2 825	3 468	39 051
45 to 49 years	436	213	223	211	222	2	1	502	39 417	19 112	20 305	16 167	17 078	2 833	3 115	37 422
50 to 54 years	505	242	263	239	262	2	1	490	34 859	16 200	18 659	13 912	15 870	2 209	2 701	35 323
55 to 59 years	562	266	296	266	293	–	2	401	31 617	14 565	17 052	12 499	14 759	2 007	2 235	32 956
60 to 64 years	538	265	273	263	271	–	2	409	28 554	12 730	15 824	10 964	13 780	1 696	1 983	27 924
65 to 69 years	454	212	242	208	241	3	–	415	23 953	9 937	14 016	8 519	12 165	1 359	1 802	24 003
70 to 74 years	347	174	173	173	173	1	–	340	19 367	7 622	11 745	6 514	10 407	1 067	1 292	18 581
75 to 79 years	262	108	154	108	153	–	1	241	14 051	5 113	8 938	4 434	8 050	654	861	12 261
80 to 84 years	198	56	142	55	142	–	–	150	8 851	3 019	5 832	2 603	5 306	389	497	6 491
85 years and over	183	62	121	62	121	–	–	96	6 138	2 074	4 064	1 723	3 598	325	443	4 223
Under 18 years	3 193	1 649	1 544	1 632	1 532	12	7	2 841	217 157	110 262	106 895	85 864	82 432	23 713	23 808	203 586
62 years and over	1 727	739	988	733	985	4	2	1 487	88 924	35 068	53 856	30 107	47 643	4 736	5 999	82 313
65 years and over	1 444	612	832	606	830	4	1	1 242	72 360	27 765	44 595	23 793	39 526	3 794	4 895	65 559
Median age	31.3	29.8	32.8	29.8	32.8	18.6	32.5	33.2	29.1	27.8	30.5	28.9	32.1	21.6	24.3	31.6

DEFENDANT'S EXHIBIT NUMBER 2, INTRODUCED INTO EVIDENCE AT HEARING ON DEFENDANT'S MOTION FOR NEW TRIAL

(FRONT)

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

Summons for Jury Service

To

YOU ARE HEREBY SUMMONED to appear before the Honorable FOREST W. HANNA, Judge of DIVISION 13 of the Circuit Court of Jackson County, Missouri ANNEX 306 W KANSAS INDEPENDENCE RM 100, ON MONDAY THE 15 day of NOVEMBER, 1976 AT 8:30 o'clock AM to serve as a juror until discharged.

IF YOU FAIL TO APPEAR YOU MAY BE HELD IN CONTEMPT OF COURT.
BRING THIS SUMMONS WITH YOU.
PLEASE READ THE INSTRUCTIONS ON REVERSE SIDE.
(OVER)

JOHN R. FITZGERALD
Jury Commissioner

NOVEMBER 15

PLEASE BRING THIS ENTIRE CARD WITH YOU WHEN YOU APPEAR AT THE JURY ASSEMBLY ROOM.

(REAR)

INSTRUCTIONS

Please note the Judge and location on the front side of this card. You must report to him on the day and at the time specified.

No male juror shall be excused from service except for sufficiently valid reasons to be APPROVED BY THE JUDGE or upon PERSONAL APPEARANCE BEFORE SAID JUDGE AS SHOWN ON THE FRONT OF THIS CARD. Applications for excuses must be presented to said Judge on or before 12 o'clock noon on the Thursday preceeding the date which you are to appear as shown on the reverse side.

A physically disabled juror must show that to appear and serve would endanger his health. Such proof must be in the form of a doctor's certificate and be presented to the Judge the same as other applications.

[illegible], if you do not wish to serve, return this summons to the Judge named on the reverse side as quickly as possible.

[illegible], if you are over 65 years of age and do not wish to serve, return this summons to the Judge named on the reverse side the same as other applications, before 12 noon Thursday preceeding your date of service. Give your date of birth in your request.

[illegible], if you are no longer a resident of Jackson County, Missouri, you are not eligible for jury service. Please let us know you have moved by returning this summons promptly giving your present address.

All persons duly summoned by mail as jurors may be attached for non-appearance and fined by the court for contempt.

[illegible] that we are unable to furnish parking for jurors.

[illegible] bring this Summons with you when you appear at the Jury Assembly Room.

JURY COMSSR: 6500/ JURY COMSSR: 6500/9/75

DEFENDANT'S EXHIBIT NUMBER 3, INTRODUCED INTO EVIDENCE AT HEARING OF DEFENDANT'S MOTION FOR NEW TRIAL

2													
3	24 LAST NAME				42 FIRST NAME							41 DOB	
4	24 HOUSE #	33 NS	31 EW	32 STREET NAME				52 APT NO LOT					

DO NOT WRITE ABOVE THIS LINE
FOR INTERNAL USE ONLY

OFFICIAL NOTICE AND QUESTIONNAIRE

(Not a Summons)

EXHIBIT 1

AUG 18 1976

L

Enter change of home address here: MAE RYALS
(Number and Street or Rural Route) (City or Town) (Zip Code)

You have been selected under the provisions of the Missouri statutes for jury service.
This questionnaire should be returned immediately.
The laws of the State of Missouri provide that if you do not answer and return this questionnaire, you are subject to citation for contempt.
The law further provides that if you knowingly and falsely answer any of the questions herein contained, you may be guilty of a misdemeanor.
The law requires your name to be placed in the jury wheel if answer is not received promptly.

BY ORDER OF THE BOARD OF JURY SUPERVISORS, UNDER AND BY AUTHORITY OF LAW.
ANN CLARDY,
Jury Commissioner

(1) Please state your sex. Male (.....) Female (.....).

(If you are a female and do not wish to serve, see bottom of questionnaire).

(2) Name of husband or wife. .....

(3) Are you over sixty-five years of age? Yes (.....) No (.....).

Date of Birth. Month.....; Day.....; Year.....

(4) Are you a member of the fire company or police department?
Yes (.....) No (.....). (If your answer is "yes", state which.) .....

(5) Are you actually exercising the functions of clergyman or any professor or other teacher of any school of learning? Yes (.....) No (.....). (If your answer is "yes", state where you are so engaged.) .....
.....

(6) Are you a registered and licensed osteopathic physician, veterinarian or chiropractor? Yes (.....) No (.....).
(If your answer is "yes", state which.) .....

(7) If you are a female, or if your answer to any of the above questions 3, 4, 5 and 6, is "yes", then under the law of Missouri, you cannot be compelled to serve as a juror, so state if you will serve. Yes (.....) No (.....).

(8) Are you actually engaged in the practice of law, medicine or dentistry? Yes (.....) No (.....). (If so, please state which profession.) .....

(9) Are you a member on active duty with any branch of the Armed Forces of the United States? Yes (.....)
No (.....).

(10) Is the address shown on the questionnaire correct? Yes (.....) No (.....). (If your answer is "no", state present address.) .....

(11) Are you physically able to serve? Yes (.....) No (.....). (If not, attach physician's or authorized Christian Science practitioner's statement or you will be called.)

(12) Have you served within the last year? Yes (.....) No (.....). (This will be checked if your answer is "yes".)

_____
Signature

TO MEN OVER 65 YEARS OF AGE:

If you are over sixty-five and elect not to serve, fill out this paragraph and mail questionnaire at once to jury commissioner. It will not be necessary to answer the other questions.

Give date of birth _____ _____ _____
Day Month Year

I elect not to do jury service.

_____
Signature

TO WOMEN:

The constitution permits women to elect to serve or not to serve as jurywomen. Any woman who elects not to serve will fill out this paragraph and mail this questionnaire to the jury commissioner at once. It will not be necessary to answer the other questions.

I elect not to perform jury service.

_____
Signature

RETURN THIS QUESTIONNAIRE WITHIN 10 DAYS.

TABULATION OF DATA OBTAINED FROM LISTS OF JURORS SUMMONED FOR MARCH, 1976

Week Beginning:		Jurors Summoned	(%)	Excused	Deferred	Not Appearing	Appeared For Service	(%)
March 1, 1976.	Female	90	(72.0%)	56	2	13	19	(13.1%)
	Male	231	(28.0%)	64	21	20	126	(86.9%)
	Total	321		120	23	33	145	
March 8, 1976.	Female	107	(31.9%)	64	2	9	32	(21.8%)
	Male	228	(68.1%)	67	37	9	115	(78.2%)
	Total	335		131	39	18	147	
March 15, 1976.	Female	107	(31.2%)	62	3	17	25	(15.2%)
	Male	228	(68.8%)	58	23	15	140	(84.8%)
	Total	343		120	26	32	165	
March 22, 1976.	Female	50	(26.0%)	27	1	8	14	(15.6%)
	Male	142	(74.0%)	40	17	9	76	(84.8%)
	Total	192		67	18	17	90	
March 29, 1976.	Female	99	(28.6%)	65	3	11	20	(12.5%)
	Male	247	(71.4%)	70	27	10	140	(87.5%)
	Total	346		135	30	21	160	
TOTAL FOR WEEKS OF MARCH, 1976	Female	453	(29.5%)	274	11	58	110	(17.0%)
	Male	1,084	(70.5%)	299	125	63	597	(83.0%)
	Total	1,537		573	136	121	707	

NOTE: Defense Exhibits Nos. 5 and 6, being respectively the 1976 Petit Jury Wheel and the weekly attendance record of March 29, 1976, both introduced into evidence during the hearing on Defendant's Motion for New Trial held April 21, 1976, are not reproduced here due to their inordinately large bulk, but rather are available in the record for the Court's reference.

SENTENCING OF DEFENDANT

THE COURT: All right. It is the judgment and sentence of this Court that the defendant be confined for the period of his life for the offense of Murder in the First Degree in connection with an attempt to rob; said sentence to be served at such place of confinement as may be designated by the Missouri Department of Corrections.

It is the further judgment and sentence of this Court that the defendant be confined for the period of his life for the offense of Assault with Intent to Kill with Malice Aforethought; said life sentence to begin upon the expiration of the life term previously imposed herein, and said sentence, likewise, to be served at such place of confinement as may be designated by the Missouri Department of Corrections, to whom the defendant is ordered committed.

IN THE SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI,
Respondent,
vs
BILLY DUREN,
Appellant.

No. 59,914

OPINION—September 27, 1977

RENDLEN, JUDGE

Defendant, convicted of murder first degree and assault with intent to kill was sentenced to consecutive terms of life imprisonment. He appealed to the Missouri Court of Appeals, Kansas City district, raising questions of constitutional construction and because those issues fell within the exclusive appellate jurisdiction of the Supreme Court under Art. 5, §3, Mo.Const. as amended in 1976, the cause was transferred here prior to opinion. Two assignments of error are presented: (1) failure to quash the jury panel because Missouri's jury selection process systematically excludes women, and (2) erroneous joinder and trial of the murder and assault charges. We affirm.

The case arose from defendant's fatal shooting of Carrol Riley and wounding of Lee Kinnison during an attempted robbery at a United States Post Office in Jackson County, Missouri. Riley, attempting to thwart the crime, was shot in the head by defendant who turned and then shot Kinnison, a bystander. Sufficiency of the evidence to support the verdict is not challenged.

THE JURY SELECTION ISSUE

Defendant first contends his motion to quash the petit jury panel was erroneously overruled in that Art. I, §22(b), Mo.Const.[1] and its implementing statute § 494.031(2),

[1] Mo.Const. Art I, §22(b) provides: "No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror."

R.S.Mo. Supp. 1975,[2] served to exclude women from the jury in such numbers as to render those sections invalid and destroy the panel's efficacy under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.[3] The Sixth Amendment has recently been interpreted in *Taylor vs Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), to invalidate constitutional and statutory provisions of Louisiana relative to jury selection procedures. The voided sections were Art. VII, § 41 of the Louisiana Constitution:

> "[N]o woman shall be drawn for jury service unless she shall have *previously filed with the clerk* of the District Court a *written declaration of her desire* to be subject to such service." (Emphasis supplied.)

and Art. 402, Louisiana Code of Criminal Procedure:

> "A woman shall not be selected for jury service *unless she has previously filed* with the clerk of court of the parish in

[2] §494.031, R.S.Mo. Supp. 1975—Pertinent portions of the statute are as follows: "The following persons shall, upon their timely application to the court, be excused from service as a juror, either grant or petit: . . . (2) Any woman who requests exemption before being sworn as a juror; . . . ."

[3] Women first became eligible for jury service in Missouri under the Constitution of 1945. Cases challenging jury composition on the basis of sex soon followed. In *State vs. Taylor*, 356 Mo. 1216, 205 S.W.2d 734 (1947), failure to include women among those summoned as prospective jurors was held not to be error on the rationale that the new state constitutional provision and implementing statutes permitted but did not require that women serve. To similar effect see *Parker vs. Wallace*, 431 S.W.2d 136 (Mo. 1968). Three years later, the selection of petit jurors from voter registration lists was held constitutionally permissible in *State vs. Parker*, 462 S.W.2d 737 (Mo. 1971), except in cases that result in the "systematic exclusion of a 'cognizable group or class of qualified citizens'" [l.c. 738]. That case relied in part on *Hoyt vs. Florida*, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961), which was later overruled in *Taylor vs Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). Defendant argued in *State vs. Smith*, 467 S.W.2d 6 (Mo. 1971), that based on mathematical probabilities the exclusion of all women from seventy-one talesmen called, made a case of intentional discrimination, but the court reversing, deemed it unnecessary to rule the point as it found from the sheriff's testimony clear evidence of impermissible "intentional exclusion". More recently the court in *State vs. Wright*, 476 S.W.2d 581 (Mo. 1972), upheld Missouri's jury selection system against attack based on the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, finding no showing of sex-based class disparity had been made.

which she resides a *written declaration of her desire* to be subject to jury service." (Emphasis supplied.)

Examining those constitutional and statutory provisions the Court stated, "Accepting as we do, however, the view that the Sixth Amendment affords the defendant in a criminal trial the opportunity to have the jury drawn from venires representative of the community, we think it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost totally male" [l. c. 537, 95 S.Ct. l. c. 701]. Defendant had moved to quash the petit jury venire of St. Tammany Parish, where he was indicted, and in connection with his motion the following facts were stipulated: (1) 53% of persons eligible for jury service in the parish were women but not more than 10% of the names in the wheel were those of women; (2) during a period 4 months prior and six and a half months following trial, 1,800 names were drawn to fill parish petit jury venires and of that number only 12 (less than 1%) were female; (3) 175 male but no female names were drawn for jury service in April, 1972 (the month of trial); and (4) the disparity between eligible women and those included in wheel and venire resulted from the operation of the cited constitutional and statutory sections.

The thrust of *Taylor* is that no longer in criminal cases may women as a class be excluded from jury service or automatically exempted on the basis of sex, if as a consequence, jury venires are almost totally male. The Louisiana automatic exemption found constitutionally infirm required women to come forward and file with the district court clerk written declarations stating their desire or intention to serve as jurors, otherwise their names would *not* be included. Such affirmative action, not required of Louisiana male citizens, resulted in almost totally male criminal jury venires and the effective exclusion of females.

The Court made clear, however, that "[t]he States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community" [l.c. 538, 95 S.Ct. l.c. 701][4] Also, while juries must be drawn from a source fairly representa-

[4]To like effect see *Carter vs. Jury Commission of Greene County*, 396 U.S. 320, 332, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970).

tive of the community, no requirement was imposed "that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition. . ." [l.c. 538, 95 S.Ct. l.c. 702].

Proper exemptions from jury service are permitted to promote the orderly and efficient operation of overloaded judicial systems. Under § 494.020, R.S.Mo. Supp. 1975, a number of classes are excluded from jury service.[5] In addition to excluded classes, § 494.031 R.S.Mo. Supp. 1975, allows others to be excused on timely application to the court; for example, persons over 65 years of age; doctors of medicine, osteopathy, chiropractic and dentistry; clergy; professors and teachers in any school or institution of learning. Also, Art. I, §22(b) Mo.Const. mandates that the court shall excuse any woman requesting exemption before being sworn, and this provision is implemented by § 494.031(2), R.S.Mo. Supp. 1975. It is this female privilege to opt for excuse from jury service toward which defendant directs his complaint.

Examining defendant's contention, we first must emphasize that in Missouri, women's rights to serve on juries are fully protected and equal to those of men. Art. I, §22(b) Mo.Const. provides that "[n]o citizen shall be disqualified from jury service because of sex. . . ." Thus the rights of Missouri's male and female citizens to serve as jurors, without class discrimination, are constitutionally insured. This constitutional guarantee against gender based disqualification is a far cry from equal protection cases cited by defendant for example, the stigmatized blacks of Georgia whose more than 24 year exclusion from jury service was condemned in *Norris vs Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935), and which led to adoption of the "rule of exclusion" in race discrimination cases. Nor does our system discriminate against either sex in the manner the rights of Mexican-Americans to serve on juries were denied by the jury commissioners' conduct in *Her-*

[5]§494.020, R.S.Mo. Supp. 1975, describes many excluded classes, some of which are: those unable to understand the English language persons on active duty with the Armed Forces of the United States; licensed attorneys; judges of courts of record; persons suffering mental or physical illness or infirmity rendering them incapable of performing the duties of a juror.

nandez vs. Texas, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954). Neither do we have the highly subjective key man jury commissioner scheme of *Hernandez*, described as "susceptible to abuse" and "purposeful discrimination" in *Castaneda vs. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed2d 498 (1977), nor the non-random culling process by which class designations were emphasized in *Alexander vs. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972). *Castaneda*, not decided when this case was argued, and *Alexander*, not cited by defendant, are illustrative of the elements and problems of proof in equal protection based jury challenges. Finally, our jury selection process is quite dissimilar from the peculiar, "racially" controlled multi-layered Georgia system for school board and jury selection criticized in *Turner vs. Fouche*, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970).

The suspect practices condemned in those cases as denying equal protection because of invidious discrimination are neither condoned nor permissible in the jury selection system of Jackson County. The right of each class (men or women) to serve is equal. While members of either class may for cause shown, request and be granted exemption, in the case of women excuse from duty is more easily obtained, as a bare request suffices. However, the case confronting the Court in *Taylor* was one in which women as a class were denied such right to serve, absent affirmative action not required of men. For women in Louisiana, jury selection had been aptly described as a "volunteer" system, limited to those who filed declarations and asked to be included in the list. The Court however, recognizing the absence of susceptibility to abuse or purposeful discrimination in the system common to the "equal protection" cases cited above, based its determination not on equal protection considerations but instead on Sixth Amendment provisions for jury trial as that amendment binds the states under the due process clause of the fourteenth Amendment. See *Duncan vs. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

The cited Missouri statute, § 494.031, R.S.Mo. Supp. 1975, and Art. I, §22(b) of the Constitution are not within the ambit of *Taylor* for two reasons. First: The Louisiana scheme imparied the *right* of the affected class. On the other hand, the *right* of Missouri women to jury service

remains inviolate though they enjoy an expanded privilege to seek exemption and both sexes are automatically included in wheel and panels unless affirmative action is taken to be excused. In short, ours is not the automatic gender exclusion invalidated by *Taylor*, thus the presumption of constitutionality attaching to state procedures has force here. Second: Equally important to the outcome of this case is the fact that the *results* of Louisiana's jury selection scheme contrast sharply with those of the selection process in this case. Before comparing the *results* of the two systems, we must first examine the mechanics of the Jackson County process from the proof appearing in the record.

Defendant submitted 1970 Jackson County census figures reflecting approximately 407,000 county inhabitants over 21 years of age, with 54% (221,000) women and 46% (185,000) men, urging that we assume this gender distribution of Jackson County population from 1970 to 1976, and the Jackson County annual jury selection process begins with current voter registration lists, not 1970 census figures. Thus the gross population and percentage figures offered by defendant appear patently overinclusive for the purpose here. This overinclusiveness is in part demonstrated by the following: No proof was offered that the sexes registered to vote in direct relation to their numbers; also, those 18 years and older are eligible to register which further distinguishes the 1976 voter registration lists from the 1970 (21 years and older) census figures defendant asks us to consider; in addition, the fluidity of voter registration lists reflects the constantly changing population patterns, and it was argued by respondent that percentage-wise more men normally register than women. All of this suggests that statistics of current "eligible population" referred to in *Alexander vs. Louisiana*, supra, not 6 year old gross population figures, provide the proper starting point.

Though defendant seems to have fallen short in his burden of establishing constitutional invalidity, assuming arguendo that 54% of the 1976 voter registration lists (as in the 1970 census gross population figures) were female and assuming that all on the lists were eligible jurors, the 1976 Jackson County jury selection process was as follows: (1) By questionnaires, jury commissioners randomly canvassed 70,000 names of the county voter registration lists. The

questionnaires notified those canvassed of women's privilege to elect not to serve. (2) From returned questionnaires, the 1976 wheel or master jury list was compiled containing 30,000 names of men and women apparently qualified for jury duty; however, no information was adduced of the wheel's gender distribution except an unverified pencil note on Exhibit #5 (the computer print-out of the wheel) showing 29.1% women. (3) From the wheel, jury panels were summoned on a random basis each week and those summoned were notified of the female option to decline service. (4) For the periods June through October, 1976 and January through March, 1976, approximately 11,197 persons were summoned for jury duty and of that number 2,992 or 26.7% were women. (5) Of those summoned, 5,119 persons appeared and of that number 741 or 14.5% were women.

In March, 1976 (the time of trial), 1,537 were summoned for jury duty and of that number 453 or 29.5% were women and of 707 appearing 110 or 15.5% were women.[6] These figures reflect a dramatically higher percentage of female representation in wheel and panels than condemned in *Taylor*. There, only 10% of the wheel was female and 1,800 persons drawn in St. Tammany Parish during the relevant ten and a half month period (four months prior and six and a half months after the trial), only 12 (less than 1%) were female and we are not informed if any of them appeared during the entire ten and a half months. This stands in marked contrast to the fact that during the month of defendant's trial, 29.5% of all venires summoned in Jackson County and 15.5% of those appearing for trial were female.

We are not told the number of women requesting exemptions but we do know that women originally canvassed who failed to return the questionnaire were automatically deemed eligible and included in the wheel. Those who claimed exemption could do so for a wide array of reasons other than the fact of their sex. For example, school teachers and government workers, whose jobs typically attract substantial numbers of women, may decline to serve under R.S.Mo. Supp. 1975, § 494.031(5) and (7) respectively. We know from *Taylor*, 419 U.S. at 535 n. 17, 95 S.Ct. 692 that Department of Labor statistics indicate that

[6]The panel of 53 in this case included 5(9.4%) women, and the final 12 were male.

in October of 1974, 54.5% of all women between 18 and 64 years of age were in the labor force. Additionally, 61% of persons over 65 are women who may have declined to serve only for reasons of age under § 494.031(1), R.S.Mo. Supp. 1975, which inferentially reduces the ranks of eligible female jurors whom defendant insists opted off for reasons of sex. Regardless of these matters highlighting defendant's evidentiary shortcomings, which reasonably would diminish the percentage of females who might have sought sex-based exemptions, the number of female names in the wheel, those summoned and those appearing were well above acceptable constitutional standards.[7]

[7]Citing *Turner vs. Fouche*, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970), decided on equal protection grounds, defendant urges that error in the trial court's failure to quash the jury panel appears from the statistics alone, but neither *Turner* nor subsequent cases support this position. See *Alecander vs Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972).

Turner was a civil case brought by Negro residents involving Georgia's peculiar system of selecting the Taliaferro County Board of Education. The scheme provided for a County Board of five free-holders selected by the grand jury, which in turn was drawn from a jury list selected by the six county jury commissioners who were appointed by the State Superior Court Judge for the circuit in which the county was located. Statistical evidence showed 60% of Taliaferro County residents were Negro against 37% Negro representation in the questioned lists from which the grand jury was chosen. At every layer of the selection system white citizens were in total control, though all students in the county schools were Negro.

The trial court found that until suit was instituted "Negroes had been systematically excluded from grand juries through token inclusion." Against this background of pervasive discrimination the Court determined that a newly drawn grand jury list with 37% Negro representation, though of less racial disparity than previous lists, was nevertheless the product of continued purposeful discrimination. The prior list of 130, withdrawn after suit was filed, had contained only 11 Negro names. While the selection scheme was not found facially unconstitutional, the opportunity for discrimination was present. A number of citizens were declared unqualified by the white commissioners for lack of "intelligence" or "uprightness" and 178 persons (of whom 171 were Negroes) were so stricken.

From these and related facts, the Court concluded appellant made a prima facie case of purposeful discrimination. The disparity occurred at the point where subjective standards were applied setting the stage for the finding of pervasive discrimination which when coupled with statistical showing of underrepresentation led to reversal. Such purposeful or

The impediment of the Louisiana female "volunteer" or automatic exclusion system, was coupled with statistics showing sufficient sex disparity to work reversal. However, the Louisiana system did not contain the opportunity for subjective selection or discriminatory conduct by those in control of the system as in the previously cited equal protection cases, and the process was invalidated only on a strong showing that criminal jury venires were "almost totally male." Accordingly, we cannot say the jury selection process in Missouri and the resulting venires were violative of that standard enunciated in *Taylor*.

Defendant next challenges the system and its results as violative of the Fourteenth Amendment and makes an ambiguous argument referring to the "methodology approved in *Hernandez vs. Texas*," *supra*. *Hernandez* was a case turning on denial of "equal protection" and from this we assume defendant is directing his argument to that clause of the Fourteenth Amendment.[8]

In *Hernandez*, a Mexican-American and a member of the prejudiced class proved that for 25 years no person of Mexi-

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pervasive discrimination, neither suggested nor shown here, distinguishes the case as bar from *Turner* and renders the percentage of negro participation in Georgia inapplicable here. In the disparity cases, as distinguished from those involving exclusion [e.g., *Hill vs. Texas*, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559 (1942)] the Court typically has held a prima facie case is not made on the basis of statistics alone. In such cases, we find not only substantial disparity between the numbers of the eligible class and those included in the list, but also the opportunity in the selection procedures for discriminatory conduct calculated to produce the underrepresentation.

[8] A question arises concerning this male defendant's standing to raise an "equal protection" claim against the alleged exclusion of women from his jury. It was settled in *Taylor vs Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), that such claims when couched in the Sixth Amendment and Fourteenth Amendment due process terms, may be made by one not a member of the excluded class. However, a male defendant's standing to challenge alleged exclusion of female jurors as a denial of Fourteenth Amendment equal protection rights was not decided by *Taylor*. A male defendant's standing to raise that issue is at best tenuous. In *Peters vs Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), a white defendant challenged his conviction on due process *and* equal protection grounds stemming from the systematic exclusion of Negroes from the grand jury that indicted and the petit jury that convicted him. The Court noted that the question of standing for one not of the excluded class has never before been decided by the

can or Latin American descent had served on grand or petit juries or as jury commissioners in Jackson County, Texas, though 14% of the county population were of this class and it was stipulated that at least "some" had the legal prerequisites for such service. The Court invoked the "rule of exclusion" articulated in *Norris*, *supra*, because of the clear proof of long term class exclusion from jury service. From the 25 year exclusion and the systems' inherent opportunity for subjective discrimination, a presumption of equal protection denial arose, not rebutted by the jury commissioners' general assertion that they sought to select "those whom they thought were best qualified" [347 U.S. l.c. 481, 74 S.Ct. l.c. 672]. Though the Texas selection system was "fair on its face" it was "susceptible to abuse" and being "employed in a discriminatory manner" [l.c. 478–79, 74 S.Ct. 667]. This, plus a history of total exclusion, gave rise to the unsuccessfully abutted presumption.

No such exclusion or subjective discriminatory treatment at the hands of jury commissioners occurred in the case at bar. The names in both wheel and panels were picked at random from the registered voter lists. Women were not excluded nor (as heretofore discussed) were their *rights* to jury service diminished. Neither was the freedom of men to this cherished *right to serve* reduced or diluted in any way. The *rights* of each class were and are equal. While it might be argued the *duty* of men to serve is increased if women elect to opt off, men as a class may not reasonably be heard

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Court and that a number of state and lower federal courts had imposed a "same class" rule on challenges to discriminatory jury selection holding that the exclusion of a class from jury service is subject to challenge only by a member of the excluded class. However, the Court in *Peters* upheld defendant's standing to challenge the validity of the exclusion, when that challenge bottomed on a claimed denial of "due process of law" [l.c. 504, 92 S.Ct. 2163]. Thus while we may say with certainty male defendants have standing to raise Sixth Amendment jury questions and Fourteenth Amendment due process claims in cases where females are systematically excluded from the venire, standing of male defendants to raise "denial of equal protection" issues in such cases has not been decided and we find no binding authority for such proceedings. To the contrary, the Court has held "there is nothing in past adjudications suggesting that petitioner himself [a male] has been denied equal protection by the alleged exclusion of women from grand jury service." *Alexander vs Louisiana*, 405 U.S. 625, 633, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972).

to complain that an added opportunity to participate in the system, which increases a cherished long-sought right, effects an equal protection denial for their class rising to a constitutionally impermissible level. Similarly, women may not be heard to claim a violation of equal protection when, while enjoying full rights to serve, by their free choice elect for a variety of reasons not to serve. This is a privilege declined, not right diminished.

The question then becomes, whose rights are constitutionally affected? Since neither men nor women as a class may make a valid denial of equal protection claim, from the defendant's point of view this is not a problem best defined as one of "equal protection." Instead, as in *Taylor*, the question for the individual defendant is set in terms of his rights to a jury representative of the community under the Sixth Amendment made applicable to state procedure by the due process clause of the Fourteenth Amendment. We have previously discussed defendant's contention in that context and determined there has been no denial of such right. Defendant's first assignment of error is denied.

THE JOINDER AND SEVERANCE ISSUES

Defendant next contends the court erred permitting joinder of two charges against him in a single indictment and compounded the error by denying his motion for severance, thereby forcing him to defend both counts in the same trial.

The charges of murder in the first degree for killing Riley, and assault with intent to kill for shooting Kinnison were part of the same transaction, the attempted robbery. Joinder of the charges as separate counts of the indictment is expressly permitted by Rule 24.04, as amended in 1971.[9] See *State vs. Baker*, 524 S.W.2d 122 (Mo. banc 1975). The shootings occurred at the same place, in close succession and in connection with defendant's scheme to rob. Though each was a separate criminal offense, both were parts of the same transaction and by stating them in separate counts the state cannot be said to have attempted splitting a single

[9]Rule 24.04, effective July 1, 1971 provides in pertinent part: "All offenses which are based on the same act or on two or more acts which are part of the same transaction or on two or more acts or transactions which constitute parts of a common scheme or plan may be charged in the same indictment or information in separate counts, or in the same count when authorized by statute."

crime to prosecute in separate parts. This court made clear in *Baker* that a criminal defendant has neither a federal nor a state constitutional right to be tried on only one offense at a time. Referring to Rule 8 (a) of the Federal Rules of Criminal Procedure of similar effect as our Rule 24.04, the court at page 126 stated: "This rule has been described as constituting essentially a restatement of statutory and familiar law and as not violating due process of law." In that case, involving a three count information, defendant requested the counts be tried together, effectively waiving any objection to the single trial of multiple charges but on appeal defendant contended such procedure was constitutionally impermissible. Rejecting this contention for reasons other than the apparent waiver, the court held that joinder of charges and trial of the separate offenses in a single proceeding was properly permitted.

Defendant invites us to find that the 1971 amendment to Rule 24.04 affects substantive rights and thus was promulgated in violation of Art. V, § 5 of the Missouri Constitution[10] rendering the joinder of counts and failure to sever erroneous and asks us to order reversal of the convictions. We decline the invitation for reasons stated in *Baker*, *supra* at 127:

> "Rule 24.04 is a *procedural* rule. It, like Rule 8(a) of the Federal Rules of Criminal Procedure, merely permits joining in one information or indictment certain related multiple offenses which otherwise would have been charged separately. It does not mandate any difference in treatment between those charged jointly and those charged in separate informations or indictments. It makes no provision with respect to the amount of punishment to be imposed or whether sentences shall be concurrent or consecutive." (Emphasis added.)

It may no longer be questioned that in a proper case offenses joined in a single indictment or information may be tried together. See *State vs. Morgan*, 539 S.W.2d 660 (Mo.App.1976), for a discussion of the rationale of *Baker* as it relates to *Ashe vs. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), and the Fifth Amendment guarantee

[10]Mo.Const. Art. V, § 5—"The supreme court may establish rules of practice and procedures for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. . . ."

The 1976 revision to this article does not affect the issue here.

against double jeopardy. The Supreme Court of Arizona in *State vs Pierce*, 59 Ariz. 411, 129 P.2d 916 (1942), considered an attack on its rule authorizing joinder of different offenses under separate counts, charging it was violative of a defendant's substantive right in a criminal proceeding. The court rejecting this contention commented that defendant had not suggested any manner wherein the rule violated any substantive right and concluded "and we can think of none. The *method* of trial of the defendant in a criminal case, in a civil, is procedural and not substantive . . ."[l.c. 917].

The remaining question concerns denial of defendant's motion for severance. Defendant bases his contention on the single argument that current Rule 24.04 is void; and from this he concludes the joinder was error, requiring severance. As noted above, the joinder was proper and defendant's major premise in this argument fails.

Further, severance is matter within the sound discretion of the trial court directed toward achieving a fair determination of the defendant's guilt or innocence of each offense charged. The court should consider, among other relevant factors, the number of offenses charged, the complexity of the evidence to be offered and whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense. The court remains under a continuing duty during trial to counter prejudice and order severance if necessary to achieve the fair result intended. Defendant has neither suggested nor has our examination of the record disclosed any abuse of discretion in denial of the requested motion for severance. This contention of error is denied.

The judgment of the trial court is affirmed.

MORGAN, C. J., and HENLEY and FINCH, J. J., concur.

DONNELLY, J., concurs in result.

BARDGETT, J., dissents in part and concurs in part in separate opinion filed.

SEILER, J., dissents in separate dissenting opinion filed.

BARDGETT, Judge (concurring in part and dissenting in part).

I concur in that part of the principal opinion dealing with the jury selection issue. I dissent from that part of the opinion styled, "THE JOINDER AND SEVERANCE ISSUES", in which the court holds that Rule 24.04, in authorizing joint trial of separate offenses over a defendant's objection, is a constitutionally proper exercise of this court's rulemaking power under art. V, sec. 5, Mo.Const., as amended, and that a defendant is not entitled to a severance as a matter of right.

The right to be tried for separate offenses is, in Missouri, a substantive right which is subject to change only by statute. *State vs Terry*, 325 S.W.2d 1, 4 (Mo. 1959), and not by court rule. My reasons for so concluding have been set forth in my dissenting opinion in *State vs Neal*, 514 S.W.2d 544 (Mo. banc 1974), and my concurring opinion in *State vs Baker*, 524 S.W. 2d 122 (Mo. Banc 1975).

In addition to the reasons stated in my separate opinions in *Neal* and *Baker*, the reasoning of Henley, J., and the court's holdings in *State vs. Bursby*, 395 S.W. 2d 155 (Mo. 1965), support the conclusion that a right to a severance of counts alleging separate crimes is a substantive matter in Missouri.

In *Bursby*, the defendants (Bursby brothers) were charged in one information with three counts as follows: count 1—burglary of the Terry Town Store building owned by Lonus Speight and stealing therefrom; count 2—burglary on the same date of a tin grainery owned by Speight, located near the Terry Town Store, and stealing therefrom; and count 3—stealing of Speight's cement mixer located near the store building. The defendants, without counsel and upon waiving counsel, entered a plea of guilty to the information after being told by the judge they were charged with "a felony;" that they were entitled to a jury trial and counsel, etc. The court sentenced them to a term of four years on each of the three counts, the sentences to run consecutively. The Bursby brothers thereafter filed a 27.26 motion which was denied without hearing and the appeal came to this court.

This court granted relief holding that a person could be tried and convicted of only one felony at a time. The court said at 157–158:

> "The offenses of burglary, and stealing in connection with such burglary, although separate and distinct crimes, may

be joined in one information, and an accused may be tried and convicted of both offenses in one trial only because the rule and statute authorize and permit such as an exception to the general rule; the general rule being that an accused may not be charged, tried and convicted at the same time of two separate and distinct offenses. *State vs. Preslar*, 316 Mo. 144 290 S.W. 142 and cases there cited; *State vs Terry*, Mo., 325 S.W.2d 1, 4 [3], and cases there cited."

And, quoting from *State vs. Preslar*, 316 Mo. 144, 290 S.W. 142, 143–144, *Bursby* further stated at 158–159:

"* * *In justice to all parties concerned, we think the matter should be disposed of as though counsel for appellant made no request of the court to require the prosecuting attorney to elect upon which of the four counts he would proceed, until the filing of the motion for a new trial, as aforesaid. On the other hand, the [trial] court ruled it was not required to order an election under the laws of this state. We hold that, under the rulings of this court, the question of election is not a mere matter of form, which may be waived, as claimed by the state, supra, but it involves a question of jurisdiction and power. This principle of law was announced with great clearness and force by Judge Gantt in the leading case of *State vs. Carragin*, 210 Mo. [351] loc. cit. 371, 109 S.W. [553] 558, (16 L.R.A. [N.S.]561) where he said: 'In instructing the jury that they might find the defendant guilty under both counts, and in refusing to require the prosecuting attorney to elect after all the evidence was in, the court committed reversible error. We know of no case under our practice in which an accused may be tried and convicted of two distinct felonies except in the case of burglary and larceny, which is expressly allowed by statute.'

"The law, as above written is fully sustained by other decisions of this court, as follows: *State vs. Guye*, 299 Mo. [348] loc. cit. 366, 252 S.W. 955; *State vs. Link* [315 Mo. 192], 286 S.W. 12 et seq.

"We have no hesitation in holding that, on the record before us, the judgment of conviction in which defendant has been sentenced to the penitentiary for 8 years on four separate counts of the information, cannot stand the test of judicial cirticism, under the laws of this state. We are of the opinion that it was the absolute duty of the trial court in this case, whether requested or not, to have directed the prosecuting attorney, before submitting the case to the jury, to elect on which of the four counts in the information he would proceed to trial and to strike out the remainder. In addition to foregoing, as a part of the state's case, whether requested or not, it was the imperative duty of the court to instruct the jury that they could not find the defendant guilty except on the single count submitted for their consideration. *State vs. Burell*, 298 Mo. [672] loc. cit. 678, 679, 252 S.W. 709, and cases cited."

Art. V, sec 5, Mo.Const., says that the rules of practice and procedure "shall not change substantive rights." The principal opinion follows the observation of Finch, J., in *Baker, supra*, to the effect that Rule 24.04 is a rule of procedure. That observation is sound, in my judgment, and one with which I do not disagree, but it is not dispositive of the issue which the constitution puts to us. The point is that Rule 24.04 is a rule of procedure which *changes* the substantive right of criminal defendants to have separate trials for separate offenses, a right which was the practice of our courts to honor prior to the promulgation of the rule.

What is a "substantive" right? Former Governor Guy B. Park, who introduced the amendment which later became art. V, sec 5, at the 1943–44 Constitutional Convention, described substantive rights as "rights guaranteed by the Constitution of this state and of the nation. The rights that have been established by custom and by common law—they shall not be abridged, enlarged nor modified." XIII Debates of the Missouri Constitution 1945 at 3824.

The Convention considered an amendment to that which became sec 5 which would have granted unlimited power to the Supreme Court to promulgate rules of practice and procedure. Delegate Garten, speaking as one "unreservedly opposed to this amendment," suggested that it was "too great a delegation of power" which fails to "give the Legislature the power to annul or amend *some rule which may endanger private rights.*" XIII Debates of the Missouri Constitution 1945 at 3875. (Emphasis added.) The amendment was defeated by a voice vote.

In *Maurizi vs Western Coal & Mining Co.*, 321 Mo. 378, 11 S.W.2d 268 (banc 1928), we described as substantive law "'that part of the law which creates, defines and regulates rights as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion.'" *Id.* at 272. See also *Shepherd vs Consumers Cooperative Association*, 384 S.W.2d 635 640 (Mo.banc 1964); *Barker vs St. Louis County*, 340 Mo. 986, 104 S.W.2d 371, 3770378 (1937); *Ambrose vs State Department of Public Health & Welfare*, 319 S.W.2d 271, 274

(Mo.App.1958); *Poyser vs Minors*, 7 Q.B.D. 329, 333 (1881).

Was the general rule prior to our adoption of Rule 24.04, as enunciated in *Bursby, supra*, a rule of "substantive" dimension? I believe the answer to be yes.

In seeking to understand the origin of our general rule prior to 24.04, it has been necessary to examine the foundation for the decisions wherein the old rule was reaffirmed. *Bursby* relies on *State vs Terry, supra*, and *State vs Preslar, supra*, which rely on *State vs Carragin*, 210 Mo. 351, 190 S.W. 553 (1908), which relies on *Mayo vs State*, 30 Ala. 32,33 (1857), and *Mayo* relies on *State vs Nelson*, 8 N.H. 163, 165 (1835), which states: "[N]o court ever permits a prisoner to be tried for two distinct and separate crimes upon one indictment; because by such a course he might be confounded in his defense, and the minds of the jurors distracted."

Nelson finally relies upon *Young vs The King*, 3 D.&E. 98 (K.B.1789), which says at 106 per Buller, J., that the rule exists "lest it should confound the prisoner in his defence, or prejudice him in his challenge of the jury; for he might object to a juryman's trying one of the offences, though he might have no reason to do so in the other. . . . I thought it the soundest way of administering justice . . . in order to give a prisoner a fair trial."

What our Rule 24.04 changed was a rule which existed "in order to give a prisoner a fair trial." I cannot imagine a rule of greater substantive import. It is not relevant that Rule 24.04 can be described as procedural. After all, "[t]he history of American freedom is, in no small measure, the history of procedure." *Malinski vs New York*, 324 U.S. 401, 414, 65 S.Ct. 781, 787, 89 L.Ed. 1029 (1945) (Frankfurter, J.). A procedural rule can affect and change substantive rights. In my judgment, our Rule 24.04 does so, and is thus beyond our constitutional authority.

In my opinion, it was error to deny defendant's motion for severance. It should have been granted. See concurring opinion of Donnelly, J., in *Neal, supra*, at 550.

SEILER, Judge (dissenting).

I join in the dissent of Bardgett, J., on the question of our lack of authority to promulgate rule 24.04 for the reason that it is a procedural rule which changes substantive rights and dissent further on the question of whether our provision permitting women to exempt themselves from petit jury services, Art. I, §22(b), Mo.Const.[1] and §494.031(2) R.S.Mo. Supp. 1975, survives the challenge of *Taylor vs Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975) and the equal protection clause of the United States Constitution. I believe it does not and that the judgment of conviction should be reversed and the cause remanded for this reason also.

The principal opinion is in error, in my judgment, in proceeding on the premise of an alleged "right of Missouri women to jury service" which "remains inviolate though they enjoy an expanded privilege to seek exemption. . . ." No such "right to serve" exists. Many qualified citizens will never sit on a jury. No one has a right to insist that he or she, in particular, be summoned for jury service or serve on a jury.

Rather, a criminal defendant's right to a trial by jury, applicable to the states under due process clause of the Fourteenth Amendment, *Duncan vs. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), includes the right to "a fair possibility for obtaining a representative cross-section of the community." *Williams vs. Florida*, 399 U.S. 78, 100, 90 S.Ct. 1893, 1906, 26 L.Ed.2d 446 (1970). To this right is attached a correlative duty on the part of those citizens called to serve, see *Hohfeld*, Some Fundamental Legal Conceptions as Applied to Judicial Reasoning, 23 Yale L.J. 16, 30–32 (1913). Jury service, in short, "is not a right or privilege which may be claimed, but is an obligation imposed by law upon those who come within a designated class possessing the required qualifications." 47 AM.Jur.2d *Jury* § 90 (1969).

The principal opinion denies the alleged unconstitutionality under *Taylor* of our scheme for the voluntary exemption

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[1] The constitutional exemption for women was the subject of extended debate at the Constitutional Convention, VI Debates of the Missouri Constitutional Convention 1788–1814 (1943–44). A motion to remove the exemption lost 31–32, with the chair casting the deciding vote. Id. at 1814. One of the principal objections voiced by those who would remove the exemption was that if women were permitted to avoid jury duty by self-exemption, the objective of a representative cross-sectional jury would not be realized.

of women from jury duty for two reasons. One is that "the right of Missouri women to jury service remains inviolate." As I have noted, no such "right" exists. The fact that the *duty* remains inviolate is not dispositive: the duty of women to serve remained inviolate under the Louisiana system, which was nonetheless found unconstitutional in *Taylor*. The second reason is that "the results of Louisiana's jury selection scheme [held unconstitutional in *Taylor*] contrast sharply with those of the selection process in this case."

The principal opinion observes that the fact that only 14.5–15.5 percent of the jury panels in the relevant period in Jackson County were made up of women (1) represents "a dramatically higher percentage of female representation . . . than that condemned in *Taylor*" where less than one percent of the jury panels during the relevant period were made up of women, and (2) is nevertheless explainable "for a wide array of reasons other than the fact of their sex," such as, for example, the exemptions permitted of school teachers and government workers "whose jobs typically attract substantial numbers of women" or that permitted to persons over age 65, 61 percent of whom are women.

The rule in *Taylor* is that "it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequences is that criminal jury venires are almost totally male." 419 U.S. at 537, 95 S.Ct. at 701. It is not necessary to show a governmental intent to discriminate against women, but only to evaluate the "systematic impact" of our system upon defendants' rights. *Taylor vs Louisiana*, *supra* at 524, 95 S.Ct. 692. The findings before us show that 85 percent of the relevant jury panels in Jackson County were male. No excuse, whether derived from the observations of this court of the role of women in our society or from a percentage comparison of the Louisiana and Missouri systems, can overcome the end result of our gender based exemption. Eighty-five percent or approximately six men to one woman is, to me, "almost totally male." I simply cannot understand it to be otherwise. The *Taylor* case does not say that anything more than one percent women is constitutional. The situation in Jackson County is not as bad as it was in St. Tammany Parish, but it does not have to be in order to fit the description "almost totally male."

In Jackson County, Missouri, the right of the women to exemption is given considerable prominence, first in the

Official Notice and Questionnaire and next in the summons for jury service. In each she is invited to excuse herself. "[O]nce a woman was informed of her right to automatic exemption, the likelihood that she would be a willing participant in the administration of justice declined markedly." Comment, 41 Mo.L.Rev. 446, 454 (1976). See *People vs Moss*, 80 Misc.2d 633, 366 N.Y.S.2d 522 (Sup.Ct.1975).

In the case before us and in the four other cases which were argued along with it, involving five criminal trials in Jackson County, between April 1975 and March 1976, using the jury selection system outlined in the principal opinion, the record showed that a maximum of 15 percent of any jury panel were women.[2]

Contrast this with the federal court in the Western Division[3] of the Western District of Missouri, where the court has no automatic exemption for women, 28 U.S.C. §§ 1861, et seq. (1970), 1968 Federal Jury Selection and Service Act. There according to recent statistics 53 percent of the persons on the master wheel and 39.8 percent of the actual jurors were women, J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitments to Representative Panels 357 (1977). Yet aside from the unlimited self-exemption provision for women,[4] there is no significant difference between the two court systems as to groups or occupational classes which are excused from jury service.

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[2]The other four cases were as follows: In *State vs Harlin*, Mo., 556 S.W.2d 42, of the persons summoned and who appeared as prospective jurors during the week of defendant's trial, only 9.2 percent were women. In *State vs Davis*, Mo., 556 S.W.2d 45, it was 15 percent women. In *State vs Lee*, Mo., 556 S.W.2d 25, it does not appear how many of the 300 summoned appeared, but on the panel of 90 for the defendant's case, only 10 percent were women. In *State vs Minor*, 556 S.W.2d 35, it does not appear how many jurors were summoned but of the 55 on the defendant's panel, only 10.9 percent were women.

[3]The Western Division includes Jackson County and ten other counties. Two thirds of the population of the division is in Jackson County. See Population of Counties, Official Manual of State of Missouri, 1975–1976, Table 3, commencing at page 1217.

[4]Instead, the federal court provides for excuse on request by a woman charged with care of minor children without adequate domestic help. Amended Plans of the United States District Court for the Western District of Missouri for Random Selection and Service of Grand and Petit Jurors § 14(i) (1972).

"In a complex society such as ours, a jury that is the true 'conscience of the community' must include a fair cross-section of the groups that make up the community. Each person comes to the jury box as an individual, not as a representative of an ethnic, racial, or age group. But since people's outlooks and experiences do depend in part upon such factors as socioeconomic status, ethnic background, sex, or age, to ignore such differences is to deny the diversity in society as well as the fundamental character of the 'community' whose voice is to be heard in the jury room. So, although each juror's individuality must be respected (in fact, the system counts on jurors trying to overcome their prejudices to judge a case on its own merits), the juror's identification with certain demographic groups must be respected." J. Van Dyke, supra at xiv.

The principal opinion, finally, deals briefly with appellant's claim under the equal protection clause of the Fourteenth Amendment. The problem of defendant's standing to raise the equal protection claims of himself or of third party males who would allege a disproportionate burden in violation of their equal protection guarantees is indeed a serious one. Under current United States Supreme Court doctrine it is speculative as to how such a standing question might be resolved, granting that the principle of a representative jury is a requirement of equal protection, *Smith vs Texas*, 311 U.S. 128, 130, 61 S.Ct. 164, 85 L.Ed. 84 (1940). See *Craig vs Boren*, 429 U.S. 190 193–97, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Peters vs Kiff*, 407 U.S. 493, n. 4, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972) (opinion by Marshall, J.) (referring to the "same class" rule of some courts that the exclusion of a class from jury service is subject to challenge only by a member of the excluded class); Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L.J. 599 (1962); Note, Standing to Assert Constitutional Jus Tertii, 88 Harv.L.Rev. 423 (1974).

We are not, however, bound by the justiciability doctrines of the federal system which derive from the Article III "case or controversy" requirement of the Constitutional and the prudential concerns which the Supreme Court has applied as "matters of judicial self-governance." *Warth vs Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed/2d 343 (1975); see Comment, 50 N.Y.U.L.Rev. 1163, 1171–73 (1975). Rather, we are obligated to apply our own standards of judticiability. Note, Protecting Fundamental Rights

in State Courts: Fitting a State Peg to a Federal Hole, 12 Harv.C.R.–C.L.L. Rev. 63, 90–93 (1977).

I would hold that here "the exclusion of a discernible class from jury service injures not only those defendants of the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross-section of the community," *Peters vs. Kiff*, *supra* 407 U.S. at 500, 92 S.Ct. at 2167 (opinion of Marshall, J.), that there exists in the instant case a sufficient nexus between the status of the claimant, his allegation, his legal interest, and his requested relief to permit his standing to assert a denial of the equal protection of the laws by our gender based exemption provision for jury duty. We have recently held that a primary objective of the standing doctrine is "to assure that there is a sufficient controversy between the parties [so] that the case will be adequately presented to the court . . . [for the] purpose of preventing parties from creating controversies in matters in which they are not involved and which do not directly affect them. . . ." *Ryder vs. County of St. Charles*, 552 S.W.2d 705, 707 (Mo.banc 1977). That objective has surely been met here.

I would then consider the substantive merits of the equal protection claim.

"To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig vs. Boren*, *supra*, 429 U.S. at 197, 97 S.Ct. at 457; see Johnston, Sex Discrimination and the Supreme Court 1971–1974, 49 N.Y.U.L.Rev. 617 (1974). Under that rule, I can find no valid justification for our gender based scheme, and would therefore hold that it denies defendant equal protection. See Note, *Taylor vs. Louisiana:* Constitutional Implications for Missouri's Jury Exemption Provisions, 20 St. Louis U.L.J. 159 (1975); Comment, 41 Mo.L.Rev., supra.

Supreme Court of the United States

No. 77-6067

BILLY DUREN,

Petitioner,

v.

MISSOURI

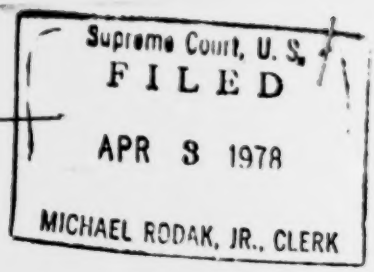
ON PETITION FOR WRIT OF CERTIORARI TO THE Supreme Court of the State of Missouri.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

May 1, 1978

IN THE

SUPREME COURT OF THE UNITED STATES



_____ TERM, 1978

No. 77-6067

BILLY DUREN,
Petitioner,

v.

STATE OF MISSOURI
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE MISSOURI SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

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Taylor v. Louisiana, 419 U.S 522 (1975);

U.S. Const. amend. VI;

U.S. Const. amend. XIV;

Art. 1, § 22(b), Mo. Const.;

Section 494.020, RSMo 1969;

Section 494.031, RSMo 1969;

Chapter 497, RSMo 1969.

IN THE

SUPREME COURT OF THE UNITED STATES

_____

_____ TERM, 1978

_____

No. 77-6067

_____

BILLY DUREN,
Petitioner,

v.

STATE OF MISSOURI
Respondent.

_____

ON PETITION FOR WRIT OF CERTIORARI TO
THE MISSOURI SUPREME COURT

_____

BRIEF FOR RESPONDENT IN OPPOSITION

_____

OPINION BELOW

The opinion of the Missouri Supreme Court is reported at 556 S.W.2d 11. A copy of that opinion appears in the petitioner's Appendix A.

JURISDICTION

On September 27, 1977, the Missouri Supreme Court issued an opinion affirming the petitioner's conviction for murder in the first degree and assault with intent to kill. Thereafter, on September 29, 1977, petitioner filed a timely motion for rehearing. Petitioner's motion for rehearing was overruled by the Missouri Supreme Court on October 11, 1977. The petitioner subsequently filed this petition for writ of certiorari on January 16, 1978. United States Supreme Court Rule 22 provides that a petition for writ of certiorari to review a judgment of a state court is untimely unless it is filed within ninety days after the entry of that judgment. This rule has been interpreted to mean that a petitioner has ninety days from the denial of his timely motion for rehearing

to file a petition for writ of certiorari. Department of Banking v. Pink, 317 U.S. 264 (1942); Foreman v. U.S., 361 U.S. 416 (1960). Since the petitioner's motion for rehearing was denied on October 11, 1977, the petitioner had until January 9, 1978, to file a timely petition for writ of certiorari. His petition is therefore untimely. While it is true that Supreme Court Rule 22 is not jurisdictional and this Court has authority to review this case, it should not in view of the fact that no good cause has been shown for the petitioner's failure to comply with Supreme Court Rules. Cf. Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co., 385 U.S. 32 (1966).

QUESTION PRESENTED

Was the petitioner's right to a fair trial denied because the Missouri Constitution gives women the right to avoid jury duty by requesting an exemption?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment and the Fourteenth Amendment to the United States Constitution, Article I, Section 22(b) of the Missouri Constitution, Section 494.020, Section 494.031 and Chapter 497 of the Missouri Revised Statutes 1969. These constitutional provisions and statutes are set out in full in the respondent's Appendix A.

STATEMENT

The petitioner Billy Duren was convicted of murder in the first degree and assault with intent to kill in connection with a robbery attempt at the United States Post Office in Kansas City, Missouri. Prior to his trial the petitioner filed a motion to quash the jury venire claiming that it had not been drawn from a representative cross-section of the community because of the operation of Article I, Section 22(b) of the Missouri Constitution. In support of his motion the petitioner introduced statistical evidence which showed that the percentage of women who appeared for jury service in the two months preceeding his trial was: January - 12.3%; February - 17.6%. The petitioner

also submitted the testimony of John Fitzgerald, the Jackson County jury commissioner, and Robert J. Kramer, the director of data processing for the Sixteenth Judicial Circuit of Missouri, to indicate how jurors were selected to serve in Jackson County, Missouri. The petitioner's motion to quash the jury was overruled. Petitioner again raised the question of the constitutionality of the jury selection procedure in Jackson County in his motion for new trial. At the hearing on his motion for new trial he introduced evidence from the 1970 United States census which indicated that 54.4% of the population of Jackson County is women, and that the percentage of women who appeared for jury service in the month of March when the petitioner was tried was 17%. The petitioner also introduced into evidence the master print-out of the 1976 Jackson County jury wheel which contained an unverified pencil note showing 29.1% women. The petitioner's motion for new trial was overruled.

The petitioner's conviction was appealed to the Missouri Supreme Court and heard in conjunction with State of Missouri v. Minor, State of Missouri v. Lee, and State of Missouri v. Harlin, since each of these cases also raised the question of whether Article I, Section 22(b), of the Missouri Constitution operates to exclude women from jury duty resulting in jury panels which do not represent a fair cross-section of the community.

On September 27, 1977, the Missouri Supreme Court affirmed the petitioner's conviction holding that Article I, Section 22(b) of the Missouri Constitution does not exclude women from jury duty and that the jury panel from which the petitioner's jury was chosen did represent a fair cross-section of the community. Similar opinions were returned in Lee, Harlin and Minor. Petitions for writ of certiorari have also been filed in those cases.

In order to fully understand the question presented by this case, it is necessary to consider the jury selection system which is employed in Jackson County, Missouri. That system is mandated by Section 494.031, Section 494.020, and Chapter 497 of the Revised

Statutes of Missouri 1969, and Article I, Section 22(b) of the Missouri Constitution. Each of these provisions appears in respondent's Appendix A.

The jury selection system in Jackson County begins with the voter registration list. From that list the jury commissioner selects at random by computer approximately 70,000 names. A questionnaire is then sent to each individual selected. A copy of that questionnaire appears in Section 497.130, RSMo Supp. 1975, respondent's Appendix A. Among other things, that questionnaire notifies women of their right to be excused from jury duty. When these questionnaires are returned, the jury commissioner eliminates all individuals whose questionnaire indicates that they have exercised their right to be excused or that they are unqualified to serve as jurors.* The remaining pool of names is then entered into a computer and 25,000 names are randomly selected for the master jury wheel. If an individual fails to return the questionnaire then the individual's name is automatically included in the pool from which the master jury wheel is selected. In Jackson County a new jury wheel is prepared each year.

Individuals are periodically selected from the master jury wheel by computer to make up the general jury panel for all civil and criminal divisions of the Jackson County Circuit Court. Jury summonses are sent out to each one of those individuals randomly selected from the jury wheel. These summonses notify women that they have a right to be excused from jury duty. After receiving the summons, the individual is given an opportunity

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* In order to promote an orderly and efficient judicial system, certain individuals are excluded from jury service by Section 494.020, RSMo Supp. 1975. For example, licensed attorneys and those unable to understand the English language may not serve on juries in Missouri. Section 494.031, RSMo Supp. 1975, on the other hand, allows certain individuals to be excused from jury duty if they make a timely application to the court; for example, persons over 65, doctors of medicine, school teachers, government workers, or clergy. Also, Article I, Section 22(b) mandates that a court shall excuse any woman who requests exemption before she is sworn.

to present to the circuit court reasons why he or she would be unable to serve as a juror. All jurors who are not excused should appear in the circuit court for jury duty. If a woman does not appear, it is assumed that she has exercised her right not to serve. Venire panels are then randomly selected from the individuals which have appeared for jury duty and the petit jury is selected from the venire panel. In the petitioner's case the record would indicate that his jury venire of 53 had 5 women and his petit jury of 12 was totally male. Seventeen percent of the persons who appeared for jury duty and composed the general jury panel for the week of petitioner's trial were women.

ARGUMENT

I

The Missouri Supreme Court's decision in State of Missouri v. Bill Duren is not in conflict with this Court's decision in Taylor v. Louisiana, 419 U.S. 522 (1975).

In Taylor v. Louisiana, supra, this Court held that the jury selection system employed by the State of Louisiana deprived criminal defendants of their right to an impartial trial. La. Const. Art. VII, Section 41 (since repealed), sets out the constitutionally offensive procedure:

> "The legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no women shall be drawn for jury service unless she shall have previously filed with the clerk of the district court a written declaration of her desire to be subject to such service. . . ."

This Court pointed out that this provision operated to systematically exclude women from jury service, and therefore, deprived criminal defendants of a jury composed of a fair cross-section of the community.

On the basis of the Taylor decision, the petitioner argues that he was deprived of his right to a fair trial because Article I, Section 22(b) of the Missouri Constitution allows women to avoid jury duty by requesting an exemption. The Louisiana constitutional provision cited and Article I, Section 22(b) of the Missouri Constitution, however, are readily distinguishable. In Louisiana a woman was not eligible for jury service unless she took affirmative steps to inform the court of her desire to serve as a juror. In Missouri, on the other hand, women are automatically included in the jury list. They are excused from jury service only when they take affirmative steps to notify the court that they do not wish to serve. The Missouri system of jury selection, therefore, does not exclude women. It merely allows an exemption for those who choose to exercise it. In this Court's opinion in Taylor, it stated that ". . . jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." Taylor v. Louisiana, supra at 538 (emphasis added) The petitioner relies heavily on this language in Taylor and yet it is evident from Article I, Section 22(b) of the Missouri Constitution that women in no way are excluded by the State of Missouri from serving on juries. They are not in any way even remotely inhibited from serving on juries. It is solely their decision as to whether they will exercise their right to be excused.

Taylor v. Louisiana also indicates that a defendant must show that the jury wheels from which juries are chosen fail to reasonably represent a cross-section of the community. Petitioner has asserted that he has met the burden of proof imposed by Taylor v. Louisiana. In Taylor v. Louisiana, however, the evidence showed that no more than 10% of the persons on the master jury list were women, that only twelve women were among the 1,800 persons drawn to fill petit jury venires during the period when the defendant was tried; and that the 175 member venire from which the defendant's petit jury was in fact drawn had no women

on it. In contrast, the petitioner's own evidence shows that 17% of the persons appearing for jury service in the month of the petitioner's trial were women and that the 53 member venire from which the petitioner's jury was chosen contained five women. This composition could hardly be characterized as almost totally male, the standard enunciated in Taylor v. Louisiana. It seems clear that the situation in Taylor v. Louisiana, supra, was an extreme case which resulted from the state's requirement that women take affirmative steps to participate in the jury selection process, effectively excluding women from jury service. Such is not the case in Jackson County, Missouri.

--

This case is plagued with evidentiary problems which will prevent this Court from reaching the question of whether the defendant's right to a fair trial has been denied.

The petitioner alleges that the female jury exemption in Missouri causes gross underrepresentation of women on jury panels. The record in this case, however, does not show that there is any relationship between Article I, Section 22(b), and the alleged underrepresentation of women on juries in Jackson County. First, the petitioner has failed to present eligible population statistics. At the hearing on his motion for new trial, the petitioner introduced the 1970 United States census figures which show that Jackson County had approximately 407,000 inhabitants over 21 years of age and 54% of those inhabitants were women. The annual Jackson County jury selection process, however, begins with the current voter registration list. No proof was made that the sexes register to vote in direct relation to their numbers or that there has not been a significant change in the makeup of Jackson County, Missouri, between 1970 and 1976 when the petitioner's jury was selected. As stated by the Missouri Supreme Court in State v. Duren:

> "All of this suggests that statistics of current 'eligible population' referred to

in Alexander v. Louisiana, supra, not six year old gross population figures, provide the proper starting point." State v. Duren, supra at 16

More importantly, the petitioner has failed to produce any evidence to show that the percentage of women who actually appeared in court for jury service was less than the percentage of women initially summoned for jury service because a substantial number of women exercised their right to drop out of the jury process solely because of their sex. Section 494.020, RSMo Supp. 1975, provides exemption for groups other than women For example, clergymen, doctors, teachers, dentists, or any person over sixty-five years of age are also entitled to automatic exemption from jury service. It is possible that the alleged disparity between the number of men and women on the petitioner's venire resulted from women exercising occupational or physical exemptions. Furthermore, the petitioner has failed to show that this numerical disparity was not the result of random chance. Hence, the petitioner's statistical evidence, standing alone, fails to show that the petitioner's jury was not drawn from a representative cross-section of the community because of the number of women who exercised their right to excuse themselves from jury service solely on the basis of their sex.

In Taylor v. Louisiana, supra at 524, the parties stipulated that the "discrepancy between females eligible for jury service and those actually included in the venire was the result of the operation of the Louisiana Constitution." No similar stipulation has been made in this case.

III

The scope of the question presented by this petition is so narrow that a decision by this Court will have little application.

Only the State of Missouri and the State of Tennessee still allow women an exemption from jury duty and the only place in the State of Missouri that this issue has been raised is in Jackson

County, Missouri. No complaint has been heard from any other part of the State of Missouri, although this issue has been well publicized. The scope of this petition therefore is so narrow that review by this Court is not warranted.

CONCLUSION

Wherefore, respondent respectfully requests this Court to deny the petitioner's writ of certiorari to the Missouri Supreme Court.

Respectfully submitted,

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STATE OF MISSOURI)
) ss
COUNTY OF COLE)

Philip M. Koppe, of lawful age, upon his oath states that he is an Assistant Attorney General of the State of Missouri; that on March 31, 1978, he sent copies of the Brief for Respondent in Opposition to Petition for Writ of Certiorari to the Missouri Supreme Court in the above-entitled case to the following named person:

Lee M. Nation, Esq.
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Kansas City, Missouri 64106

The service to the above-named person was made by mailing one copy, postage prepaid, to the address appearing above.

That ten copies were served on the Clerk of the Supreme Court of the United States, United States Courthouse, Washington, D.C. 20543.

Philip M. Koppe
PHILIP M. KOPPE
Assistant Attorney General

Subscribed and sworn to before me, a notary public, this 31st day of March, 1978. Notary Public, In and For the County of Cole, State of Missouri.

Cathy Lynn Clemens
NOTARY PUBLIC

My commission expires: December 14, 1980.

APPENDIX A

The Constitution and Statutory Provisions referred to in the foregoing brief and attached as Appendix A were illegible and have therefore not been reproduced.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-6067

BILLY DUREN,

Petitioner,

—v.—

STATE OF MISSOURI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR PETITIONER

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ARGUMENT:

I. MO. CONST. ART. I, § 22(b), AND MO. REV. STAT. § 494.031, WHICH AUTOMATICALLY EXEMPT "ANY WOMAN" FROM JURY DUTY, DESTROY THE POSSIBILITY OF A JURY REPRESENTATIVE OF THE COMMUNITY, THEREBY DEPRIVING ALL CRIMINAL DEFENDANTS OF A FUNDAMENTAL RIGHT SECURED BY THE SIXTH AND FOURTEENTH AMENDMENTS. 9

II. NO TENABLE JUSTIFICATION EXISTS FOR MISSOURI'S INVITATION TO "ANY WOMAN" TO AVOID JURY SERVICE: IF IT WAS EVER THE CASE THAT WOMEN WERE SO SITUATED THAT NONE OF THEM SHOULD BE REQUIRED TO SERVE, THAT TIME HAS LONG SINCE PASSED. 16

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-6067

BILLY DUREN,
Petitioner,

v.

STATE OF MISSOURI,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Missouri (en banc) is reported at 556 S.W. 2d 11 (Mo. 1977), and appears as Appendix A to the Petition for a Writ of Certiorari herein.

JURISDICTION

The judgment of the Supreme Court of Missouri was entered September 27, 1977. A timely petition for rehearing was denied October 11, 1977. The petition for a writ of certiorari was filed January 19, 1978, and certiorari was granted May 1, 1978. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether Missouri's jury selection system, which exempts "any woman" solely on the basis of her sex, denies to criminal defendants their sixth and fourteenth amendment right to a jury drawn from a panel fairly reflecting the community's population?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the sixth and fourteenth amendments to the Constitution of the United States, and the following Missouri provisions:

Mo. Const. Art. I, § 22(b): No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror.

Mo. Rev. Stat. § 494.031 (Supp. 1975), in pertinent part: The following

persons shall, upon their timely application to the court, be excused from service as a juror, either grand or petit: . . . (2) Any woman who requests exemption before being sworn as a juror; . . . .

STATEMENT OF THE CASE

On March 31, 1976, petitioner Duren was found guilty of first degree murder and assault with intent to kill by a Jackson County, Missouri all-male jury. Judgment of conviction and sentences were entered April 21, 1976. Prior to trial, on February 4, 1976, Duren filed a timely motion to quash the petit jury panel on the ground that, in violation of the Federal Constitution's fair cross-section requirement, females were systematically eliminated by virtue of Missouri's automatic exemption for "any woman." At the hearing on the motion, it was established, without dispute, that potential jurors in Jackson County, Missouri are randomly selected from voter registration lists, and that persons so selected are sent questionnaires to determine their eligibility for jury service.[1] The questionnaire prominently states:

> TO WOMEN:
>
> The constitution permits women to elect to serve or not to serve as jurywomen. Any woman who elects

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[1] See Mo. Rev. Stat. § 497.130 (Supp. 1975); State v. Parker, 462 S.W.2d 737, 738 (Mo. 1971).

not to serve will fill out this paragraph and mail this questionnaire to the jury commissioner at once. It will not be necessary to answer the other questions.

I elect not to perform jury service.

Signature

Returned questionnaires showing no exemption were placed in the jury wheel. Evidence was received showing 29.1% women in the wheel in 1976.[2] Each week, jury panels were summoned on a random basis from the wheel. For the periods June through October 1975, and January through March 1976, 26.7% of the persons summoned for jury duty were women (2992 of 11,197). In March 1976, 29.5% of those summoned (453 of 1537) were women.

The summons to prospective jurors included this conspicuous notice:

---

[2]Questionnaires were sent to 70,000 persons on the county voter registration list. From the returned questionnaires, a master list was compiled containing 30,000 names. 556 S.W.2d at 16. Voter registration in Missouri, as in the United States generally, is not significantly higher for men than it is for women. See Bureau of the Census, Current Population Reports: Voting and Registration in the Election of November 1976 (March 1978)(in Missouri, 71.1% of the men, 69.9% of the women; in the United States, 67.1% of the men, 66.4% of the women).

> Women, if you do not wish to serve, return this summons to the Judge named on the reverse side as quickly as possible. Def. Trial Ex. No. 2, App. at ____.

According to the undisputed testimony of Jury Commissioner John Fitzgerald, if a woman failed to respond to the summons, she was deemed to have exercised her option not to serve. Def. Trial Ex. No. 4, App. at ____.

For the months just prior to the petitioner Duren's trial, those appearing in response to a jury summons included 15.9% women in June 1975, 15.1% in July 1975, 13% in August 1975, 13.7% in September 1975, 10.9% in October 1975, 12.3% in January 1976, 17.6% in February 1976. At the time of trial, March 1976, 15.5% of those appearing (110 of 707) were women. The average for the period was 14.5% women (741 of 5119). Petitioner Duren's panel of fifty-three included five women (9.4%); his jury of twelve was all male. 556 S.W.2d at 16.

In dramatic contrast, in the federal district court serving the same territory, and despite the availability of a childcare excuse for mothers who lack adequate domestic assistance, women accounted for 53% of the persons on the master list, and 39.8% of the actual jurors. 556 S.W.2d at 24 (dissenting opinion).

1970 Jackson County census figures showed a population of approximately 407,000 inhabitants over 21 years of age, with 54% women and 46% men. 556 S.W.2d at 15.

Despite the uncontested showing of a female population constituting 54% of the relevant community, a population dwindling to less than 30% of those summoned to serve on juries, and to 14.5% of those appearing for jury service, the motion to quash was denied. On appeal to the Missouri Supreme Court on federal constitutional grounds, that disposition was sustained on the merits.

The Missouri Supreme Court held that the state's jury selection system, which exempts every woman for the asking simply because she is a woman, survives this Court's decision in Taylor v. Louisiana, 419 U.S. 522 (1975), and is fully consistent with sixth and fourteenth amendment limitations.

Taylor v. Louisiana, the Missouri Supreme Court acknowledged, compelled recognition that (1) petitioner Duren, a man, has standing to challenge exclusion of women from his jury, (2) the sixth amendment requires selection of petit juries from a representative cross-section of the community, (3) if women are systemically eliminated in the selection process, the sixth amendment cross-section requirement cannot be satisfied. 419 U.S. at 526, 528-33. Nonetheless, the court below ruled that the overt gender classification employed in Missouri, which inevitably yields jury panels overwhelmingly male, must be presumed constitutional. 556 S.W.2d at 15. Petitioner Duren demonstrated constant male representation on jury panels in the neighborhood of 85%, but that was not high enough, the Missouri court concluded. To overcome the presumption, Duren would have to show women were effectively excluded.

556 S.W.2d at 16-17.

The Missouri opinion offers no coherent explanation for the determination that a 6:1 male/female ratio fairly represents a local population that includes at least as many women as men. Disregarding this Court's clear instruction that "the right to a proper jury" -- one drawn from a panel reasonably "representative of the community" -- "cannot be overcome on merely rational grounds," 419 U.S. at 534, 538, the court below articulated no justification at all for Missouri's wholesale exemption of women solely on the basis of their sex. That court simply took refuge in the notion that opting out was a "female privilege."

When Taylor v. Louisiana was decided, five states (Alabama, Georgia, New York, Rhode Island, Tennessee), in addition to Missouri, allowed any woman to opt out of jury service. Currently, only Missouri and Tennessee retain an automatic exemption for every woman.[3]

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[3]Compare Tenn. Code Ann. § 22-101 (1955), with Ala. Code Tit. 30, § 21 (1959)(replaced by Ala. Code § 12-16-43 (1975)); Ga. Code Ann. § 59-112(6)(d)(Supp. 1974)(repealed by 1975 Ga. Laws, pp. 779, 780); N.Y. Jud. Law §§ 507(7), 599(7), 665(7)(McKinney 1940)(repealed by 1975 N.Y. Laws, c. 4); R.I. Gen. Laws Ann. § 9-9-11 (1969)(repealed by 1975 R.I. Pub. Laws c. 233, § 1).

Summary of Argument

I.

In Taylor v. Louisiana, 419 U.S. 522 (1975), this Court confirmed that the sixth amendment requires selection of jurors from a fair cross-section of the population. Under Missouri law, however, women but not men are permitted to "opt out" of jury service. As a result, men outnumber women on the panels from which jurors are selected by approximately six to one. This gross imbalance assures that juries will not be reasonably representative of the communities from which they are drawn. Missouri's automatic exemption for "any woman" therefore violates petitioner's rights under the sixth and fourteenth amendments to the Constitution.

II.

Traditionally, states justified women's exemptions by assuming that most women would be too busy with home and children to serve on juries, and that it would be more convenient to exempt all women than to determine which are actually unable to serve. This Court has recognized that such "archaic and overbroad" assumptions are no longer tenable. Women now constitute a substantial part of the paid labor force; only "habit," not "analysis or actual reflection," can account for the notion that women are occupied day-round in pursuits that exclude jury duty. The "convenience" of adhering to an obsolete habit of thought does not justify erosion of a

criminal defendant's sixth and fourteenth amendment rights.

Jury service is a basic responsibility of citizenship, a principal form of participation in the democratic processes of government. By giving "any woman" an automatic exemption, thus treating men's service as essential, women's as expendable, Missouri reinforces ancient prejudices harmful to women, to the jury system, and to the community at large.

ARGUMENT

I.

MO. CONST. ART. I, § 22(b), AND MO. REV. STAT. § 494.031, WHICH AUTOMATICALLY EXEMPT "ANY WOMAN" FROM JURY DUTY, DESTROY THE POSSIBILITY OF A JURY REPRESENTATIVE OF THE COMMUNITY, THEREBY DEPRIVING ALL CRIMINAL DEFENDANTS OF A FUNDAMENTAL RIGHT SECURED BY THE SIXTH AND FOURTEENTH AMENDMENTS.

In Jackson County, Missouri, as in most places, in the population eligible for jury service, women outnumber men.[4] But

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[4]Petitioner Duren submitted to the trial court, in February 1976, 1970 Jackson County census figures showing approximately 407,000 county inhabitants over 21 years of age, with 54% women and 46% (footnote continued)

in the panels from which jurors are drawn, Jackson County men dominate. Their share is eighty-five percent, or approximately six men to one woman. 556 S.W.2d at 23 (dissenting opinion). This stark disparity is not the result of happenstance. Rather, Missouri invites and achieves women's substantial underrepresentation. By Constitution and statute, publicized in the official notice and questionnaire and in the summons for jury duty, Missouri tells women their sex excuses them from service. The women's excuse is not tied to any hardship, incapacity or occupation. Based on sex per se, it bears no relationship to an individual's life situation or to the objectives of jury service. The issue here presented is whether this purposeful, solely sex-based differentiation violates the sixth amendment requirement that juries be drawn from a fair cross-section of the community's population.[5]

(footnote continued)
men. 556 S.W.2d at 15. The Missouri Supreme Court's view that census figures were inappropriate indicators of the relevant population, id. at 16, is inexplicable in light of this Court's opinion in Alexander v. Louisiana, 405 U.S. 625, 627, 629-30 (1972)(relying on 1960 census figures to establish the population presumptively eligible for jury service in a case in which prosecution commenced in September 1967), and Taylor v. Louisiana, 419 U.S. 522, 531 (1975)(relying on demographic figure of 53%).

[5]Duncan v. Louisiana, 391 U.S. 145, 149 (1968), recognized as "fundamental to the American scheme of justice" sixth amendment trial by jury in criminal cases, and declared such trial a right guaranteed to
(footnote continued)

It is petitioner's position that Missouri's scheme, by design and in operation, is impossible to reconcile with "[t]he [constitutional] principle of the representative jury." Peters v. Kiff, 407 U.S. 493, 500 n.9 (1972). Just as an exemption for "any man,""any Jew,""any black," would yield a skewed jury list, so Missouri's exemption for "any woman" means a roster not "truly representative of the community." See Taylor v. Louisiana, 419 U.S. 522, 527 (1975).

In Taylor v. Louisiana, 419 U.S. 530, the Court confirmed "the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment." It ruled that the day had passed when the cross-section requirement encompassed men, but drew in women, if at all, only in token numbers. Fair representation of the local population of men and women is the only sensible reading of the Taylor decision. Interpretation of Taylor to accommodate marked curtailment in women's representation through automatic exemption trivializes the cross-section requirement and this Court's reasoned elaboration of it.

(footnote continued)
defendants in state courts by the fourteenth amendment. Essential to the jury trial guaranteed by the sixth amendment, the Court explained in Williams v. Florida, 399 U.S. 78, 100 (1970), is a selection system assuring a "fair possibility for obtaining a representative cross-section."

For comprehensive analysis, see Daughtrey, Cross Sectionalism in Jury-Selection Procedures After Taylor v. Louisiana, 43 Tenn. L. Rev. 1 (1975).

See Daughtrey, Cross Sectionalism in Jury-Selection Procedures After Taylor v. Louisiana, 43 Tenn. L. Rev. 1, 68-82 (1975).

Petitioner Duren established below "the progressive decimation of potential [female] jurors." Alexander v. Louisiana, 405 U.S. 625, 630 (1972). The reduction pattern, dropping in two steps from 54% of the total population to under 30%, and finally to 14.5%, bears a marked resemblance to the cuts in prospective black jurors shown in Alexander v. Louisiana, 405 U.S. at 629-30. The result, underrepresentation of women on juries by 73%, surely a greater disparity than in a legion of cases in which underrepresentation of a cognizable group was held significant. E.g., Turner v. Fouche, 396 U.S. 346 (1970)(38% underrepresentation); United States v. Butera, 420 F.2d 564, 571 (1st Cir. 1970)(36% women in jury pool, compared to 52% in population; 30% underrepresentation constitutes prima facie case of illegal discrimination).[6]

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[6]Under Missouri's scheme, a defendant is far more likely to be tried by an all-male jury, and thus to be deprived of "a flavor, a distinct quality [which] is lost if either sex is excluded." Ballard v. United States, 329 U.S. 187, 194 (1946). If Missouri women were represented on Jackson County jury panels proportionately to their presence in the population, the chance of randomly drawing an all-male jury would be roughly one in 11,000. With women making up only 14.5% of the jury panels, however, the chance of drawing an all-male jury is greater than one in seven.

Moreover, as in Alexander, the statistics do not stand alone. 405 U.S. at 630. For the selection process in Missouri is distinctly non-neutral. At least at two crucial steps, when the official notice and questionnaire are dispatched, and when the summons issues, bare gender classification separates those whose service is deemed necessary from those whose participation the state declares expendable.[7] In significant contrast to Jackson County, Missouri's 14.5% figure, in places where women are not specifically exempt, their participation on juries is at least evenly matched with men's. See Daughtrey, supra, 43 Tenn. L. Rev. at 75 n.312 and authorities cited therein.

In sum, Missouri's opt out system for all females, providing a jury pool "truly representative of the community's men," but severely underrepresentative of the community's women, misses the essence

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[7]Nor does Missouri make any attempt to develop and pursue special procedures to encourage women to regard their service, like men's, as essential to the fair, effective administration of justice. Indeed, if a woman fails to respond to the summons, she is deemed to have opted out, and no further inquiry is made. Def. Trial Ex. No. 4, App. at ___. As to the state's affirmative obligation, ignored in Jackson County, Missouri, to provide a representative cross section, see Broadway v. Culpepper, 439 F.2d 1253, 1259 (5th Cir. 1971); Brooks v. Beto, 366 F.2d 1, 12-13 (5th Cir. 1966), cert. denied, 386 U.S. 975 (1967).

of "[t]he principle of the representative jury." Peters v. Kiff, 407 U.S. at 500 n.9. As restated in Taylor, the "broad representative character" of jury panels is a bedrock sixth amendment requirement "partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility." 419 U.S. at 530-31, quoting from Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946)(Frankfurter, J. dissenting). To make that diffusion and sharing possible, neither man nor woman may be exempt solely on the basis of sex.[8]

Finally, even independent of the sixth amendment, a state cannot, consistent with due process, subject a defendant to trial by a jury selected in an arbitrary and discriminatory manner. Peters v. Kiff, supra.[9] This Court's precedent makes it

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[8]Making exemption for women voluntary does not insulate the state from responsibility for the marked imbalance. Most persons of either sex will escape a time-consuming civic task, given the opportunity. "Neither man nor woman can be expected to volunteer for jury service." Alexander v. Louisiana, 405 U.S. 625, 643 (1972)(Douglas, J. concurring), citing L. Kanowitz, Women and the Law 30 (1969). See Daughtrey, supra note 5, 43 Tenn. L. Rev. at 74, 75-76 n.314 (citing commentary on phenomenon of jury service avoidance).

[9]Nor need a defendant show that the arbitrary feature of the system occasioned harm to him. For the impact of an infirm selection mechanism -- one that drops out a substantial and identifiable class (footnote continued)

apparent that rules of inclusion or exemption pigeonholing people overbroadly by gender are indeed arbitrary and discriminatory. Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Stanton v. Stanton, 421 U.S. 7 (1975); Craig v. Boren, 429 U.S. 190 (1976); Califano v. Goldfarb, 430 U.S. 199 (1977).

Thus, Missouri's blatantly sex-based jury service exemption, almost the last of the genre in the nation,[10] harks back to

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(footnote continued)
of citizens eligible for jury duty -- on "any individual trial is unascertainable," "too subtle and too pervasive to admit of confinement to particular issues or particular cases." Peters v. Kiff, 407 U.S. 493, 497, 498, 503 (1972). For studies indicating women jurors may be more sympathetic to criminal defendants, see R. Simon, The Jury and the Defense of Insanity 109 (1967); H. Zeisel, Some Data on Juror Attitudes Toward Capital Punishment 12 (1968).

[10]See note 3 supra. Before the Court decided Taylor, Louisiana had eliminated its "women's exemption," and had substituted for it a sex-neutral rule stating juries are to be "selected at random from a fair cross-section of the parish." The Louisiana rule effective since 1975 further provides that "all qualified citizens . . . shall have an obligation to serve as jurors when summoned," and "no citizen shall be excluded . . . on account of race, color, religion, sex, national origin or economic status." La. Sup. Ct. Rules XXV, § 1 (1975). The wording is similar to that of the Uniform Jury Selection and Service Act, which is premised on the theory that (footnote continued)

"one of the most dramatic cases of . . . myopia in the entire development of American law." Daughtrey, supra, 43 Tenn. L. Rev. at 50. On its face and in operation, Missouri's automatic opt out provision for "any woman" cannot survive reasoned constitutional review. The invitation to each and every woman to avoid jury duty on whim or caprice is obviously incapable of administration without regard to sex, and it inevitably produces jury panels that do not represent a fair cross-section of the community.

II.

NO TENABLE JUSTIFICATION EXISTS FOR MISSOURI'S INVITATION TO "ANY WOMAN" TO AVOID JURY SERVICE: IF IT WAS EVER THE CASE THAT WOMEN WERE SO SITUATED THAT NONE OF THEM SHOULD BE REQUIRED TO SERVE, THAT TIME HAS LONG SINCE PASSED.

Not a single viable state interest was advanced by the Missouri court for maintaining a jury selection system that invites all women to opt out.[11] Prior to this

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(footnote continued)
"actual service on the jury should be shared as widely as possible," and therefore contains no automatic exemptions. Uniform Jury Selection Service Act (U.L.A.) §§ 1,2,10,11 & Commissioners' Comments to § 11. See also 28 U.S.C. §§ 1861-62 (1970).

[11] The invitation is repeatedly extended. See 556 S.W.2d at 24 (dissenting opinion). Silence is deemed acceptance. See note supra.

Court's decision in Taylor v. Louisiana, it was routine to justify exempting all women based on their presumed role in the home, and the administrative convenience of dealing with women in lump fashion.[12] But Taylor squarely rejected those two habitual responses. As to the first, the Court declared: "If it was ever the case that women . . . were so situated that none of them should be required to perform jury service, that time has long since passed" (emphasis supplied). 419 U.S. at 537. As to the second, the Court ruled: "[T]he administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials." Id. at 535.

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[12] See, e.g., State v. Parker, 462 S.W.2d 737 (Mo. 1971); Leighton v. Goodman, 311 F. Supp. 1181, 1183 (S.D.N.Y. 1970), and other decisions cited in Appendix to Appellees' Motion to Affirm at 13-16, Edwards v. Healy, 421 U.S. 772 (1975).

Even prior to Taylor, however, the federal courts and the vast majority of the states administered jury service statutes and regulations with no automatic exemption for women. See Library of Congress Legislative Reference Service, American Law Division, June 10, 1970 report to the Senate, published in Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 725-27 (1970); Alexander v. Louisiana, 405 U.S. 625, 639-40 n.8 (1972)(Douglas, J. concurring); Brief for Appellees at 20 n.*, Edwards v. Healy, 421 U.S. 772 (1975);
(footnote continued)

Taylor was brushed aside by the court below on the ground that the former Louisiana system called upon women to opt in, while Missouri invites them to opt out. But whether the system is opt in or opt out,[13] a state exempting all women plainly does maintain "none of them should be required to perform jury service." And "the administrative convenience in dealing with women as a class" remains, in the opt out variant as in the opt in version, the basis "for diluting the quality of community judgment represented by the jury in criminal trials." In short, the Missouri Court's attempt to distinguish Taylor cannot withstand reasoned analysis.[14]

(footnote continued)
Comment, Twelve Good Persons and True: Healy v. Edwards and Taylor v. Louisiana, 9 Harv. C.R.-C.L. L. Rev. 561 (1974).

[13]New York had an "opt out" system similar to Missouri's, N.Y. Jud. Law §§ 507(7), 599(7), 665(7) (McKinney 1940), which the legislature hastened to repeal after the Taylor decision. 1975 N.Y. Laws, c.4. As the Governor explained, "[w]hile there are some minor differences between the Louisiana statute and the New York women's exemption they are basically similar and there is virtually no doubt that provisions of the Judiciary Law repealed by the bill will eventually be declared unconstitutional under the Taylor decision." Governor's Memorandum, Approval of Bills, 1975 N.Y. Sess. Laws at 1731 (McKinney). See People v. Moss, 80 Misc. 2d 633, 366 N.Y.S. 2d 522 (Sup. Ct. 1975).

[14]See Daughtrey, supra note 5.
(footnote continued)

Significantly, the Missouri court did not even essay the once standard argument, that women should be exempt because they are (or should be) occupied day round tending the hearth. On the contrary, in an ironic twist, that court suggested women's substantial labor force participation[15] as a reason for their severaly limited numbers on jury panels. It conjectured

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(footnote continued)
Taylor reiterates the leeway states have to provide "reasonable exemptions," 419 U.S. at 534, 538, but underscores that there is nothing reasonable about an exemption based solely on womanhood: "It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare any women from their present duties." Id. at 534-35 (emphasis in original).

[15]Cf. Taylor v. Louisiana, 419 U.S. at 535 n.17. As of June 1977, 56.1% of all women between the ages of twenty and sixty-four were in the paid labor force. Bureau of Labor Statistics, U.S. Dep't of Labor, Employment and Earnings, Table A-3 (July 1977). In March 1977, 46.4% of women with children under the age of eighteen were in the paid labor force, including 58.3% of those with children between the ages of six and seventeen, 48.9% of those with children between three and five, and 35.1% of those with children under three. Women constituted 41.1% of the total labor force. Hayghe, Marital and Family Characteristics of Workers, March 1977, Tables 1 & 3, Monthly Labor Review, Bureau of Labor Statistics, U.S. Dep't of Labor (Feb. 1978). And whether they are gainfully employed or not, women do not necessarily have heavy duties in the home; as of March 1976, 46.3% of all families had
(footnote continued)

that many of them qualified for, and therefore would seek, other exemptions, as government workers or teachers, for example. 556 S.W.2d at 16. But as Judge Seiler's dissenting opinion points out, 556 S.W.2d at 24, experience in the federal district court serviving the same territory demonstrates the conjecture is fanciful.

Although occupational classes excused are virtually identical in the two court systems, and despite a childcare excuse for women in the federal plan,[16] female jurors turn up in federal court in impressive numbers: women account for 53% of the persons on the master wheel, and 39.8% of the actual jurors. In short, it appears that occupational exemptions would not explain, even in small measure, the gross male/female imbalance Missouri state court jury panel figures reveal.

The sole rationale offered by the Missouri court, that the exemption is a "female privilege," is at best misguided. As Judge Seiler's dissenting opinion emphasizes, 556 S.W.2d at 23, the right at stake is the criminal defendant's. That right -- to a jury drawn from a panel fairly

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(footnote continued)
no children under the age of eighteen. Bureau of the Census, Current Population Reports, Household and Family Characteristics: March 1976, Table 6 (Series P-20, No. 311, Aug. 1977).

[16]Excuse is provided, on request, for a woman charged with responsibility for care of a minor child without adequate domestic help. See 556 S.W.2d at 24 n.4 (dissenting opinion).

representative of the local population -- is safeguarded by making jury service a statutory duty, a "crucial citizen responsibilit[y]." Broadway v. Culpepper, 439 F.2d 1253, 1258 (5th Cir. 1971). But Missouri dilutes the quality of defendant's right, it eliminates the possibility of a jury genuinely reflecting the community's composition, by effectively assuring that men's participation will overwhelm women's.

Not only did the Missouri court fail to scrutinize the supposed favor to females from the perspective of the criminal defendant's right, it also ignored the historic roots and contemporary impact of the vaunted "women's privilege." By 1977, only a court wearing blinders could shut from sight the reality that "statutes exempting women from jury service . . . reflect the historical male prejudice against female participation in activities outside the family circle." Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U. L. Rev. 675, 718 (1971).[17] Jury service is acclaimed as "one of the basic rights and obligations of citizenship," "a form of participation in the process of government." Penn v. Eubanks, 360 F. Supp. 699, 702 (M.D. Ala. 1973). "[S]ervice on a jury is of material aid to men and women who have that experience. It gives them an insight into the administration of our judicial system and tends to increase their confidence in the administration of justice."

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[17]As late as 1968, the Missouri Supreme Court held constitutional total exclusion of women from juries. See 556 S.W.2d at 13 n.3.

Letter by Chief Justice Leland Carr of the Michigan Supreme Court, reprinted in W. Hart, Long Live the American Jury 19 (1964). A scheme that treats men's service as essential, women's as expendable hardly assists female citizens to view themselves and be viewed by others as full-fledged participants in community affairs. Rather, the arrangement reinforces the stereotype that government is not a woman's business. In failing to recognize adult females as persons with full civic responsibilities as well as rights, Missouri betrays a view of women ultimately harmful to them. Cf. Alexander v. Louisiana, 405 U.S. 625, 639-42 (1972)(concurring opinion).[18]

In sum, Missouri's notion of "female privilege," the state's invitation to every woman to avoid jury duty by self-exemption, defeats the federal constitutional objective of a representative cross-sectional jury and serves no countervailing state interest.

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[18]Cf. Daughtrey, supra note 5, 43 Tenn. L. Rev. at 50 (reporting a Tennessee legislator's response to Taylor: "We don't know what the Court said and don't really care. I don't want my wife and daughter to hear testimony in criminal court."). Similarly indicative of the image of women protected by automatic exemption, and the insidious impact of such "favors" thrust on women, are De Kosenko v. Brandt, 63 Misc. 2d 895, 898, 313 N.Y.S.2d 827, 830 (1970)(litigant who sought women on her jury told not to complain to the court, challenging automatic exemption of females, but to address her lament to her sisters who prefer "television soap operas, (footnote continued)

"It is fair to infer that habit, rather than analysis or actual reflection, made it seem acceptable"[19] to type women as persons whose assistance in the administration of justice is not really needed by the community. "That kind of automatic reflex,"[20] noblesse oblige toward the sex long assumed to rate second,[21] perpetuates "a view of American womanhood offensive to the ethos of [contemporary] society." United States v. Dege, 364 U.S. 51, 53 (1960). Exemption of women from civic responsibility, not on the basis of what they do but who they are, signals their "inferior legal status without regard to [their] actual capabilities," Frontiero v. Richardson, 411 U.S. 677, 687 (1973), and stigmatizes all women, even those who do not wish to participate in community affairs. Cf. Peters v. Kiff, 407 U.S. 493, 499 (1972).

(footnote continued)
bridge and canasta, the beauty parlor and shopping" to jury service), and Goldblatt v. Board of Education, 52 Misc. 2d 238, 275 N.Y.S.2d 550 (1966), aff'd, 57 Misc. 2d 1089, 294 N.Y.S.2d 272 (1968) (exclusion of compensation for female teachers who serve on juries, while male teachers receive full salary less jury fees, is "reasonable" because men must serve, but women can avoid jury duty for the asking). See generally Ginsburg, Gender and the Constitution, 44 U. Cin. L. Rev. 1 (1975).

[19]Califano v. Goldfarb, 430 U.S. 199, 222-23 (1977)(Stevens, J., concurring).

[20]Id.

[21]See generally S. deBeauvoir, Second Sex (1949); E. Janeway, Man's World, Woman's Place (1971); W. Chafe, The American Woman (1972).

The convenience of inviting women to opt out simply because they were born female was not relied upon by the Missouri court, nor is that rationale tenable after Taylor[22] and in light of experience in the federal courts and the vast majority of state courts where no "women's privilege" is retained. And surely Missouri's adherence to an "archaic and overbroad generalization about women" cannot be disguised as "compensation for past discrimination." See Califano v. Webster, 430 U.S. 313, 317 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636, 643, 648 (1975). For labeling a woman's service expendable hardly redresses "our society's longstanding disparate treatment of women." Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (1977). Any jury service excuse required by some women because of work responsibilities at home or in the marketplace can be preserved, as it is in federal court and most states, by provisions utilizing functional classifications (i.e., hardship and occupational exemptions) rather than womanhood as the basis for exemption.[23]

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[22]See also Califano v. Goldfarb, 430 U.S. 199, 217 (1977)(rejecting the argument that gender is an appropriate substitute for functional classification whenever sex typing "save[s] the Government time, money and effort").

[23]The notion that women do not hold jobs from which absence is manageable ignores, inter alia, that home burdens, as well as burdens of employment outside the home, are increasingly shared by men and women, that many women do not perform the mother-wife role, that many who do perform that role have ample assistance at home. Indeed, when no sex specific (footnote continued)

Unnourished by sense, but reflecting "the role-typing society has long imposed" upon women, Stanton v. Stanton, 421 U.S. 7, 15 (1975), Missouri's automatic exemption for every woman insures perpetuation of unrepresentative juries, and thereby conditions for the administration of criminal justice inconsistent with the sixth and fourteenth amendments. The scheme established by Mo. Const. Art. I, § 22(b), and Mo. Rev. Stat. § 494.031(2)(Supp. 1975), injures "the jury system," "the law as an institution," "the community at large," and "the democratic ideal reflected in the processes of our courts." Ballard v. United States, 329 U.S. 187, 195 (1946).

(footnote continued)
exemption is provided, women appear less inclined than men to avoid jury duty. See Daughtrey, supra note 5, 43 Tenn. L. Rev. at 75 n.312.

CONCLUSION

For the reasons stated above, the decision below should be reversed, and the jury service exemption for "any woman" mandated by Mo. Const. Art. I, § 22(b), and Mo. Rev. Stat. § 494.031(2) should be declared unconstitutional.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-6067

BILLY DUREN,
Petitioner,

VS.

STATE OF MISSOURI,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-6067

BILLY DUREN,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Missouri Supreme Court is reported at 556 S.W.2d 11 (1977) (A. 48).*

JURISDICTION

The judgment of the Supreme Court of Missouri affirming the petitioner's conviction was filed on September 27, 1977. A timely motion for rehearing was denied October 11, 1977. The petition for a writ of certiorari was filed January 19, 1978, and certiorari was granted by this court on May 1, 1978. This court has jurisdiction pursuant to 28 U.S.C. §1257(3).

*Page references designated "A. ....." in parantheses refer to the petitioner's printed Appendix previously filed with the court. Page references designated "R. ....." refer to the transcript of the petitioner's trial.

QUESTION PRESENTED

Was the petitioner's sixth and fourteenth amendment rights to a fair trial denied because the Missouri Constitution gives women the right to avoid jury duty by requesting an exemption?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the sixth amendment and the fourteenth amendment to the United States Constitution, Article I, §22(b) of the Missouri Constitution, §§494.020, 494.031, RSMo Supp. 1975, and Chapter 497, RSMo 1969 as supplemented. These constitutional provisions and statutes are set out in full in the respondent's Appendix A.

STATEMENT

The petitioner, Billy Duren, was convicted of murder in the first degree and assault with intent to kill in connection with a robbery attempt at a United States Post Office in Kansas City, Missouri (R. 407-408). At his trial, the petitioner claimed that his sixth and fourteenth amendment rights had been violated because his jury had not been drawn from a representative cross-section of the community because of the operation of Article I (A. 4), §22(b) of the Missouri Constitution. Article I, §22(b) provides that:

> "No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror."

The petitioner argued that because so many women in Jackson County exercise their right to avoid jury duty, the panel from which his petit jury was chosen did not represent a fair cross-section of the community (A. 4).

In support of his allegation, the petitioner entered into evidence the 1970 United States Census which indicated that 54 percent of the population of Jackson County over 21 years of age were women (A. 39). He also showed that for the periods June through October 1975 and January through March 1976, approximately 11,197 persons were summoned for jury duty and of that number, 2,992 or 26.7% were women. Of those summoned, 5,119 persons appeared and of that number 741 or 14.5% were women. During March, 1976, the month of petitioner's trial, 1,537 persons were summoned for jury duty, and of that number, 453 or 29.5% were women, and of the 707 appearing, 110 or 15.5% were women (A. 45). The petitioner also introduced into evidence the master printout of the 1976 Jackson County Jury Wheel which contained an unverified pencil note showing 29.1 percent women.

Finally, the petitioner submitted the testimony of John Fitzgerald, the Jackson County Jury Commissioner, who described the process by which jurors are selected in Jackson County (A. 11-21, 29-36).[1] That jury selection system begins with the voter registration list for Jackson County. From that list, the Data Processing Department selects approximately 70,000 names. A questionnaire is then sent to each individual selected (A. 11). A copy of that questionnaire (A. 43) appears in §497.130, RSMo Supp. 1975. Among other things, that questionnaire notifies women

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1. The jury selection system in Jackson County, Missouri is mandated by Chapters 494 and 497 of the Revised Statutes of Missouri, 1969 (as supplemented), and Article I, §22(b) of the Missouri Constitution.

of their right to be excused from jury duty. When these questionnaires are returned, the jury commissioner lists all individuals whose questionnaire indicates that they have exercised their right to be excused or that they are unqualified to serve as jurors.[2] The remaining pool of names is then entered into a computer and 25,000 names are randomly selected for the master jury wheel. If an individual fails to return the questionnaire, then the individual's name is automatically included in the pool from which the master jury wheel is selected (A. 17). In Jackson County, a new jury wheel is prepared each year. A woman who has exercised her option one year to avoid jury duty is not eliminated from the jury selection process in subsequent years. Each year she must take affirmative steps to avoid jury duty (A. 19).

Individuals are periodically selected from the master jury wheel by computer to make up the general jury panel for all civil and criminal divisions of the Jackson County Circuit Court (A. 12). Jury summons are sent out to each one of those individuals randomly selected from the jury wheel. These summons notify women that they have a right to be excused from jury duty. After receiving the summons, the individual is given an opportunity to present to the Circuit Court reasons why he or she would be unable to serve as a juror. All jurors who are not excused should appear in the circuit court

2. In order to promote an orderly and efficient judicial system, certain individuals are excluded from jury service by §494.020, RSMo Supp. 1975. For example, licensed attorneys and those unable to understand the English language may not serve on juries in Missouri. Section 494.031, RSMo Supp. 1975, on the other hand, allows certain individuals to be excused from jury duty if they make a timely application to the court; for example, persons over 65, doctors of medicine, school teachers, government workers, or clergy. Also, Article I, §22(b) mandates that a court shall excuse any woman who requests exemption before she is sworn.

for jury duty. If a woman does not appear, it is assumed that she has exercised her right not to serve (A. 17). Venire panels are then randomly selected from the individuals who have appeared for jury duty and the petit jury is selected from the venire panel. In the petitioner's case the record would indicate that his jury venire of 53 had 5 women (9.4%) and his petit jury of 12 was totally male.

The petitioner's conviction was appealed to the Missouri Supreme Court on the grounds that Article I, §22(b) had deprived him of a jury drawn from a representative cross-section of the community. On September 27, 1977, that court affirmed the petitioner's conviction, holding that Article I, §22(b) of the Missouri Constitution does not exclude women from jury duty and that the jury panel from which petitioner's jury was chosen did represent a fair cross-section of the community (A. 48-64).

SUMMARY OF ARGUMENT

In *Taylor* v. *Louisiana*, 419 U.S. 522 (1975) this court condemned state practices which excluded an identifiable group from the jury selection process. The State of Missouri's decision to allow women to avoid jury duty does not operate to exclude women and therefore violates neither *Taylor* v. *Louisiana* nor those cases which preceded *Taylor*.

Moreover, although women are entitled to a jury exemption in Missouri, nearly 30% of the persons on the 1976 Master Jury Wheel in Jackson County were women and more than 15% of the persons who appeared for jury duty in the months preceding the petitioner's trial were women. The pool from which the petitioner's jury was

chosen, therefore, did represent a fair cross-section of the community.

Finally, the petitioner has failed to show how he was injured by the Missouri jury selection process. Missouri does not exclude women from the jury selection process so the integrity of the jury selection system is not undermined. Furthermore, regardless of the composition of the jury or the jury pool in this case, a guilty verdict would have been returned because of the overwhelming nature of the evidence submitted by the state.

ARGUMENT

In 1945 the State of Missouri adopted a new Constitution which provided that:

> "No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror." Missouri Constitution, Art. I, §22(b)

The wisdom of this constitutional provision is not in issue before this court. The sole issue which must be resolved in this case is whether Billy Duren, a male, convicted of murder in the first degree by overwhelming evidence, was deprived of an "impartial" jury trial solely because women in Missouri are given the opportunity to avoid jury duty. It is respondent's position that the Missouri jury selection system is constitutional on its face and moreover that there is no evidence to show that the pool from which the petitioner's jury was chosen was not representative of a fair cross-section of the community. Furthermore, even if the Missouri jury selection system does violate the sixth amendment cross-sectional standard, the petitioner has not been thereby prejudiced and he is therefore not entitled to a new trial.

I. The Missouri Jury Selection System Does Not Exclude Women and Is Therefore Distinguishable From the Louisiana System Held Unconstitutional in *Taylor* v. *Louisiana*.

It is Mr. Duren's position that the female self-exemption provision in the Missouri Constitution deprived him of his sixth amendment and fourteenth amendment rights because so few women were available for jury duty in Jackson County that his jury was not drawn from a representative cross-section of the community. To support his position he relies primarily on *Taylor* v. *Louisiana*, 419 U.S. 522 (1975). In *Taylor* this court held that the jury selection system employed by the State of Louisiana deprived criminal defendants of their right to an impartial jury trial. La. Const., Art. VII, §41 (since repealed), sets out the constitutionally offensive procedure:

> "The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no women shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service. . . ."

The court pointed out that this provision operated to systematically exclude women from jury service, and therefore, deprived criminal defendants of a jury composed of a representative cross-section of the community. It further held that a jury drawn from a representative cross-section of the community was essential to the fulfillment of the sixth amendment's guarantee of an impartial jury trial in criminal prosecutions, and that this guarantee was imposed on the states by virtue of the fourteenth amendment.

The Louisiana constitutional provision cited and Art. I, §22(b) of the Missouri Constitution, however, are readily distinguishable. In Louisiana a woman was not eligible for jury service unless she took affirmative steps to inform the court of her desire to serve as a juror. In Missouri, on the other hand, women are automatically included in the jury list. They are excused from jury service only when they take affirmative steps to notify the court that they do not wish to serve. The Missouri system of jury selection, therefore, does not exclude women. It merely allows an exemption for those who wish to exercise it.

The petitioner and the Solicitor General of the United States, however, claim that the *Taylor* decision is not limited to those cases where an identifiable group is excluded or deterred from serving on juries.[3]

The cross-sectional standard, however, has meaning only within the context in which it evolved. In *every* case cited by this court in support of its decision in *Taylor* v. *Louisiana*, an identifiable group was denied the *right* to serve on juries. In none of those cases did the court give any indication that the cross-sectional standard could be violated merely because an identifiable group was given an exemption by the state. For example, in *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946) this court defined the cross-sectional standard as follows:

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from

3. In *Taylor* v. *Louisiana*, this court repeatedly used the term "exclude" or one of its derivatives to describe the practice it was forbidding the state to engage in. "Exclude" has been defined as: To bar or keep out . . . to leave out, or to omit purposely. *Oxford English Dictionary* 1961.

> a cross-section of the community. [citations omitted] This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. *But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups.*" (*Id.* at 220) [emphasis added]

Moreover, the analytical foundation of those cases cited in *Taylor* v. *Louisiana* does not permit an extension of the cross-sectional standard to include the situation where an identifiable group is granted the privilege of self-exemption from jury duty. In *Peters* v. *Kiff*, 407 U.S. 493 (1972) this court noted that illegal and unconstitutional jury selection proceedings cast doubt on the integrity of the whole judicial process. Since the harm to the system affected both white and black defendants equally, the court held that a white person had standing to contest the validity of his conviction on the basis that black people had been excluded from the jury. Likewise in *Ballard* v. *United States*, 329 U.S. 187 (1946) this court emphasized that the defendant did not need to show that she was individually prejudiced by the exclusion of women from her jury because:

> "[t]he evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Id.* at 195.

The rationale for the court's decision in each of these cases relies heavily on the results which occur when an identifiable group is excluded from the jury selection process. Where there has been no exclusion from the jury selection process then the analysis in those cases is inapplicable.

In *Taylor* v. *Louisiana* this court recognized the importance of these cases by repeatedly condemning a jury selection system that excluded an identifiable segment of society. It recognized that the Louisiana system which required a woman to take affirmative steps to participate in the jury selection system while not requiring men to take similar steps amounted to a tacit exclusion of women and was therefore unconstitutional. Article I, §22(b) however specifically protects the right of women in Missouri to participate unfettered in the jury selection process.

Finally, when defining the parameters of the cross-sectional standard, it should be remembered that the cross-sectional standard has been made applicable to the states by way of the fourteenth amendment due process clause. It is the respondent's position that due process principles would be severely distorted if *Taylor* v. *Louisiana* is extended to include those situations where a state has neither inhibited nor excluded an identifiable group from the jury selection process.

In *Duncan* v. *Louisiana*, 391 U.S. 145, 148-149 (1968), this court listed some of the tests which have been used to determine whether a right extended by the sixth amendment is also protected against state action by the fourteenth amendment. After reviewing those tests the court concluded that:

> "The question, thus, is whether given this kind of system a particular procedure is fundamental—

> whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty." *Id.* at 149-150, n.15.

When a state either excludes or inhibits an individual from serving on a jury it is reasonable to say that a criminal defendant has been denied a "fundamental right, essential to a fair trial". This is because there is at least the appearance that the state is trying to change the outcome of the trial by limiting the kind of juror who is likely to hear the case. Since the state is obligated by our "Anglo-American regime of ordered liberty" to provide a criminal defendant with an impartial jury, an action by the state which even gives the appearance of partiality would violate the sixth and fourteenth amendments. However, when the state chooses to extend a privilege to a group by not forcing them to serve on juries, there is not even the appearance of partiality. How then have due process principles been offended? Even assuming that women have a different perspective than do men,[4] is the absence of that perspective so critical that it can be said that the "Anglo-American regime of ordered liberty" has been undermined? In prior cases this court has recognized that due process principles protect the criminal defendant's right to be tried by a jury, *Duncan* v. *Louisiana*, *supra*, his right to be represented by an attorney, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), his right to have unreliable identification testimony excluded, *Neil* v. *Biggers*, 409 U.S. 188 (1972) and his right to have evidence excluded

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4. This appears to be the assumption made by this court in *Ballard* v. *United States*, 329 U.S. 187, 193-194 (1946) when it stated: "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded."

that has been unconstitutionally seized by the police. See *Mapp* v. *Ohio*, 367 U.S. 643 (1961). In comparison with these rights a criminal defendant's right to have an arbitrary number of women available to serve on his jury is dwarfed. The petitioner has intimated that the Missouri Supreme Court's decision trivializes this court's opinion in *Taylor* v. *Louisiana*. It is respondent's position that if the petitioner's analysis is adopted by this court, it is the fourteenth amendment due process clause which would be trivialized.

II. The Petitioner Has Failed to Show That the Pool From Which His Jury Was Drawn Did Not Represent a Fair Cross-Section of the Community.

Even if the petitioner is able to convince the court that there is not a compelling distinction between the jury selection practices in Louisiana and Missouri, he is not entitled to a reversal unless he can also show that his jury was not drawn from a pool fairly representative of a cross-section of the community.[5] In *Taylor* v.

5. Clearly the Missouri jury selection system is not unconstitutional on its face. The tenth circuit in *U. S.* v. *Test*, 550 F.2d 577 (10th Cir. 1976) concluded that in order to make out a valid cross-sectional case, a defendant would need to show that: 1) an identifiable group, 2) has been systematically excluded by the jury selection process, and 3) that the result of the exclusion is that the jury pool is not representative of a fair cross-section of the community. A mere showing, therefore, that women are given an exemption from jury duty would be insufficient to support a cross-sectional challenge if the petitioner's jury panel had a sufficient number of women on it. For example, in *State of Missouri* v. *Andrew Lee Harris*, No. 39,102, Mo. Ct. of App., St.L., June 20, 1978, the defendant claimed that his sixth amendment rights had been violated because women could exempt themselves from jury duty in Missouri. The defendant's claim was summarily dismissed when the Court of Appeals noted that on the defendant's first jury panel of eighteen, thirteen were women, and on the second panel of seventeen, twelve were women. As a result, from a total of thirty-five potential jurors, twenty-five were women. The jury finally sworn was com-

(*Continued on following page*)

Louisiana, supra, this court stated that:

> "Accepting as we do, however, the view that the sixth amendment affords the defendant in a criminal trial the opportunity to have the jury drawn from venires representative of the community, we find it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequence is that criminal jury venires are *almost totally male.*" (*Id.* at 528) [emphasis added]

What then does "almost totally male" mean? "Total" has been defined as "whole, not divided, lacking no part, entire, full, complete." *Oxford English Dictionary* 1961. "Almost" has been defined as "only a little less" than. *Oxford English Dictionary* 1961. "Almost totally male" then would seem to mean only a little less than all male. That was, of course, precisely the situation in *Taylor* v. *Louisiana*. The evidence in that case showed that no more than 10% of the persons on the master jury list were women, that only twelve women were among the 1,800 persons drawn to fill petit jury venires during the period when the defendant was tried; and that the 175 member venire from which the defendant's petit jury was in fact drawn had no women on it. In contrast, the petitioner's own evidence shows that almost 30 percent of the persons on the 1976 master jury wheel in Jackson County were women; more than 15 percent of the persons appearing for jury service

Footnote continued—

prised of eleven women and one man. It would be ludicrous indeed to assume that a defendant was denied an impartial trial merely because women are given the privilege of avoiding jury duty when women were proportionally over-represented on the jury which tried him and on the venire panel from which the jury was chosen. This case also belies the accuracy of the petitioner's and this court's statement that women will refuse to serve on juries unless they are required to. A copy of the *Harris* opinion is found in Respondent's Appendix B.

during the week of the petitioner's trial were women; and that of the 53-member venire from which the petitioner's jury was chosen five were women. This composition could hardly be characterized as "almost totally male." It seems clear that the situation in *Taylor* v. *Louisiana* was an extreme case which resulted from the state's requirement that women take affirmative steps to participate in the jury selection process, effectively excluding women from jury service. Such is not the case in Jackson County, Missouri.[6]

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6. Both the petitioner and the Solicitor General of the United States have concluded that the exemption for women in Missouri results in under-representation of women on juries by a little less than 75%. They do not, however, indicate the methodology used to arrive at that figure. As discussed in Kairys, Kadane, and Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 Cal.L.Rev. 776 (1977), the critical problem faced by courts and lawyers forced to deal with cross-sectional challenges is the fact that this court has never indicated how to measure representativeness or what a permissible deviation is. In Kairys, Kadane, and Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists, supra,* five or six different standards for the evaluation of representativeness are described and the percent of under-representation varies radically depending upon what standard of evaluation is chosen. For example, if the absolute disparity standard were applied to the facts alleged by the petitioner, then the percent of under-representation would be just under 40% rather than just under 75%. The lack of uniformity and analysis in this case and in the other cases cited by the petitioner and the Solicitor General merely underscores the dangers inherent in basing constitutional principles on statistical analysis. It is hoped that if this court does extend the scope of *Taylor* v. *Louisiana,* to include those cases where the state has merely granted a group the right to exempt themselves from jury duty, that it will also provide the states with a framework in which to analyze their jury selection systems so that valid convictions will not be reversed merely because the state is unaware of which standard and deviation will be applicable.

III. The Petitioner Has Failed to Show That Article I, §22(b) Had Any Effect on the Number of Women Available for Jury Duty During the Week of the Petitioner's Trial.

Finally, a mere showing that a venire is not representative of a cross-section of the community is not sufficient. It must also be shown that the lack of representation of an identifiable group on the jury venire was the result of the systematic exclusion of that group by the jury selection process. The petitioner concludes that any disparity between the number of men and women on his venire was the result of the operation of Article I, §22 (b), Missouri Constitution. The petitioner, however, has failed to produce any evidence to show that the percentage of women who actually appeared in court for jury service was less than the percentage of women initially summoned for jury service because a substantial number of women exercised their right to drop out of the jury process solely because of their sex. Section 497.130, RSMo Supp. 1975 provides exemption for groups other than women. For example, clergymen, doctors, teachers, government workers, and any person over the age of 65 are entitled to automatic exemptions from jury service. It is possible that the disparity between the number of men and women on the petitioner's venire resulted from women exercising occupational, physical or mental exemptions.

Nor has the petitioner presented accurate statistics to show the number of women available for jury duty in Jackson County Missouri. It is true that he introduced at the hearing on his motion for a new trial the 1970 United States census which shows that Jackson County had approximately 467,000 inhabitants over 21 years of age and 54 percent of those inhabitants were women. The

annual Jackson County jury selection process, however, begins with the current registration list, not the 1970 Census. No proof was made that the sexes registered to vote in direct relation to their numbers. In fact, the petitioner in his own brief admits that a smaller percentage of women in Missouri register to vote than do men.[7] Moreover, in Missouri, as elsewhere, a person over 18 years old is eligible to vote. The percentage of women over 21 years of age, therefore, does not accurately reflect the pool of women who are available to serve on juries in Missouri.[8]

Finally, the petitioner and the Solicitor General of the United States place great emphasis on what they characterize as the two-stage process of elimination of women from the jury selection system. They point out that thirty percent of the persons on the jury wheel are women, but only about fifteen percent of the persons available for trial are women. They contend that the reduction from thirty to fifteen percent is the result of women receiving the jury summons which indicates that women are exempt from jury duty. If, however, a woman wanted an exemption merely because she was a woman, the exemption was readily available when she first received the

7. In *Jury Representativeness: A Mandate for Multiple Source Lists, supra* at n.6, the authors indicate that most underrepresentation in our jury selection system is directly attributable to the use of voter registration lists.

8. The petitioner argues that his population statistics were a valid indicator of the relevant population because similar statistical evidence was relied on by this court in *Alexander* v. *Louisiana*, 405 U.S. 625 (1972). In *Alexander* v. *Louisiana*, though, the jury selection process did not begin with a single list but with a series of lists arbitrarily chosen by the Jury Commissioner. There was no one source, therefore, built into the system which could be analyzed to determine the relevant population. It is also interesting to note that in *Alexander* v. *Louisiana* the defendant did introduce the relevant voter registration list. Moreover, in *Taylor* v. *Louisiana*, the demographics relied on by this court were stipulated to; no such stipulation has been made in this case.

questionnaire. There is at least an inference, therefore, from the evidence that those women who were excused after receiving the summons had reasons other than their sex-related exemption. In *Taylor* v. *Louisiana, supra* at 524, the parties stipulated that the "discrepancy between females eligible for jury service and those actually included in the venire was the result of the operation of the Louisiana Constitution." No similar stipulation has been made in this case.

IV. The Petitioner Has Failed to Show How He Was Harmed by the Operation of Article I, §22(b).

Finally, the petitioner has not proven nor even alleged that he was harmed in any way by the jury selection process which resulted in his petit jury. It is true that in cases prior to *Taylor* v. *Louisiana*, this court held that a defendant need not show that he was individually harmed by a violation of the cross-sectional standard. The court reasoned that a procedure which excludes an unidentifiable group from the jury selection process undermines the integrity of the jury selection system. As has been previously pointed out, however, women in Missouri are not excluded from jury duty. They can and do serve in significant numbers. Neither actual bias nor the appearance of bias could possibly result because women in Missouri are not forced to serve on juries.

What harm then has the petitioner suffered? In *Peters* v. *Kiff, supra*, and in *Ballard* v. *United States, supra*, this court placed great emphasis on the special "flavor" that women brought to a jury and referred to studies made several years ago showing that women *may* be more sympathetic to the criminal defendant. In *Peters* v. *Kiff*, the court stated that it was impossible to determine what a jury selected by a constitutional procedure would have

decided and that the state must suffer the consequences of this "unavoidable uncertainty". Respondent submits, however, that the evidence of guilt in this case is so overwhelming that no matter who had served on the petitioner's jury, a guilty verdict would have been returned. The evidence shows that on Friday, September 26, 1975, around noon, two black men attempted to rob the Post Office at 2618 Guinotte, Kansas City, Missouri. During the attempt, an electrician, Carrol Riley, was shot in the head and killed (R. 173-174, 253). Paul Davis, a customer, positively identified the petitioner as the robber who held the gun during the robbery (R. 224-226). Lee Kennison, the manager of the Post Office, testified that he saw the petitioner shoot Carrol Riley in the head (R. 255); and Floyd Sherwood, a clerk, stated that the petitioner looked similar to the robber who shot Carrol Riley in the head (R. 181). There was also testimony that after shooting Carrol Riley, the petitioner turned, paused and shot Lee Kennison in the side (R. 174, 254).

Arthur Mitchell testified that he and the petitioner were the two black men who attempted to rob the Guinotte Street Post Office (R. 327) and that Billy Duren was the one who shot Carrol Riley (R. 32). On the morning of the robbery, Mitchell and Duren went to the home of Renita Adkins, Mitchell's girl friend (R. 319). Renita Adkins overheard Duren tell Mitchell that he had some place to "rip off" (R. 212). John Starr also testified that on the morning of the robbery while he was at Renita Adkins' apartment, Mitchell and Duren asked him if he wanted to go with them to rob the post office (R. 293-294). He declined to join them and later after the robbery he called the police and told them about his conversation with Mitchell and Duren (R. 296).

The defense called Lottie Smith, Billy Duren's girl friend, and Duren's sister Mary. Lottie stated that she was with Duren at all times between Thursday night and Sunday morning when Duren was arrested (R. 359). She also indicated that she had not told anyone this until Duren had spent more than five months in jail (R. 369-370). Mary testified that around noon on the day of the robbery she saw Billy Duren and Lottie Smith in a house at 31st and Tracy (R. 376-377). Likewise, Mary testified that she had not told anyone this story until several weeks after the robbery (R. 304). Billy Duren took the stand in his own behalf and denied any complicity in the robbery, denied ever being at Renita Adkins's apartment, and denied ever having talked to Mitchell or Starr about a robbery (R. 385-390).

It has long been recognized that not every constitutional error will result in a reversal. A reversal is warranted unless a court can "declare a belief that . . . [the error] was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24 (1967). The *Chapman* standard was interpreted in *Harrington* v. *California*, 395 U.S. 250 (1969) and *Schneble* v. *Florida*, 405 U.S. 427 (1972), to mean that a reversal is not required unless there is a reasonable possibility that the error materially affected the verdict. *U.S.* v. *Valle-Valdez*, 554 F.2d 911 (1977). In this case there is no possibility that a jury selected from a pool with "X" percent women rather than 15 percent women would have reached a different verdict. Regardless of the composition of the jury, a guilty verdict would have been returned.

CONCLUSION

For the foregoing reasons, the petitioner's conviction should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES CONSTITUTION, AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION, AMENDMENT XIV:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at

any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

MISSOURI CONSTITUTION, ARTICLE I, SECTION 22(b):

No citizen shall be disqualified from jury service because of sex, but the court shall excuse any women who requests exemption therefrom before being sworn as a juror.

REVISED STATUTES OF MISSOURI, 1975 SUPPLEMENT:

497.130. List of jurors, selection, data processing equipment authorized—questionnaire—refusal to answer, contempt—false answer, misdemeanor.—1. The board of jury supervisors shall at least biennially compile a list of as many names as the board of jury supervisors designates in a written order made for that purpose by consulting any public records. Automation data processing equipment and procedures may be utilized in the selection of the names for the list and in the actual compilation of the list. The list in no case shall contain less than twenty-five thousand names to be selected as nearly as

may be equally from the several voting precincts in the county. The compiled list shall constitute the jury list. A key number shall be designated by the board of jury supervisors, in a written order made for that purpose, which shall not be the same for any two consecutive periods. The jury commissioner shall select from the list of qualified voters the names which appear on the list in positions corresponding to the key number or multiples thereof until a sufficient number of names, which in no case shall be less than twenty-five thousand, are selected to make up the required number of prospective jurors. In the selection of names of prospective jurors from the list of voters, no examination shall be made into the qualifications of persons selected, except that a suitable questionnaire and return shall be sent to the persons selected according to the key number or multiples thereof. The questionnaire shall be in the following form and none other, without additions or subtractions, to wit:

OFFICIAL NOTICE AND QUESTIONNAIRE

(Not a Summons)

No. .....

Name .....

Address .....

City .....

Enter change of address here .....

You have been selected under the provisions of the Missouri statutes for jury service.

This questionnaire should be returned immediately.

The laws of the State of Missouri provide that if you do not answer and return this questionnaire, you are subject to citation for contempt.

The law further provides that if you knowingly and falsely answer any of the questions herein contained, you may be guilty of a misdemeanor.

The law requires your name to be placed in the jury wheel if answer is not received promptly.

BY ORDER OF THE BOARD OF JURY SUPERVISORS,
UNDER AND BY AUTHORITY OF LAW.

.....

Jury Commissioner

(1) Please state your sex. Male ( ) Female ( ) (If you are a female and do not wish to serve, see back of questionnaire.)

(2) Name of husband or wife .....

(3) Are you over sixty-five years of age? Yes ( ) No ( ). Date of birth. Month ..... Day ..... Year .....

(4) Are you a member of the fire company or police department? Yes ( ) No ( ). (If your answer is "yes", state which.) .....

(5) Are you actually exercising the functions of clergyman or any professor or other teacher of any school of learning? Yes ( ) No ( ). (If your answer is "yes", state where you are so engaged.) .....

(6) Are you a registered and licensed osteopathic physician, veterinarian or chiropractor? Yes ( ) No ( ). (If your answer is "yes", state which.) .....

(7) If you are a female, or if your answer to any of the above questions 3, 4, 5 and 6 is "yes", then under the law of Missouri, you cannot be compelled to serve as a juror, so state if you will serve. Yes ( ) No ( ).

(8) Are you actually engaged in the practice of law, medicine or dentistry? Yes ( ) No ( ). (If so, please state which profession.) .....

(9) Are you a member on active duty with any branch of the armed forces of the United States? Yes ( ) No ( ).

(10) Is the address shown on the questionnaire correct? Yes ( ) No ( ). (If your answer is "no", state present address.) .....

(11) Are you physically able to serve? Yes ( ) No ( ). (If not, attach physician's or authorized Christian Science practitioner's statement or you will be called.)

(12) Have you served within the last year? Yes ( ) No ( ). (This will be checked if your answer is "yes".) (As a part of said questionnaire, the following information and none other may be elicited without addition or subtraction.)

TO MEN OVER 65 YEARS OF AGE:

If you are over sixty-five and elect not to serve, fill out this paragraph and mail questionnaire at once to jury commissioner. It will not be necessary to answer the other questions.

Give date of birth .....
Day Month Year

I elect not to do jury service.

.....

Signature

TO WOMEN:

The constitution permits women to elect to serve or not to serve as jurywomen. Any woman who elects not to serve will fill out this paragraph and mail this questionnaire to the jury commissioner at once. It will not be necessary to answer the other questions.

I elect not to perform jury service.

.....

Signature

2. When the return questionnaire is received by the jury commissioner, the name of the person returning the questionnaire shall immediately be put on the list of prospective jurors unless the person returning the questionnaire is ineligible to serve as a juror under section 494.010 or 494.020, RSMo, or is entitled to be excused from jury service under section 494.031, RSMo, and by the return questionnaire requests exemption from jury service, none of whom shall be put on the list of prospective jurors.

3. If any person refuses or neglects to answer promptly all questions and to sign his name, and return the questionnaire to the board as herein provided, his name shall be placed on the list of prospective jurors and he may be cited and charged for contempt by the presiding judge of the circuit court and caused to appear before him. After reasonable notice and a hearing, if the judge is satisfied that the refusal or neglect is without a good and sufficient reason, he may adjudge the person to be guilty of contempt.

4. If any person knowingly answers any of the questions falsely, he is guilty of a misdemeanor.

REVISED STATUTES OF MISSOURI 1969:

497.010. Juries, petit and grand, in certain counties.—In every judicial circuit in this state comprised of a county which now has or may hereafter have not less than four hundred and fifty thousand nor more than seven hundred thousand inhabitants, according to the last preceding national census, all grand and petit jurors for the circuit courts shall be selected as provided in this chapter.

497.020. Board of jury supervisors—quorum.—There is hereby created a board of jury supervisors. The judges of the circuit court of said judicial circuit shall be and constitute said board. A majority shall constitute a quorum for the transaction of business and the acts of a majority of those present at any meeting at which a quorum is present shall be the duly considered acts of the board.

497.030. Duties of board of jury supervisors.—1. It shall be the duty of the board of jury supervisors, in addition to the duties herein enumerated, to exercise a general supervisory control over the jury commissioner and all deputies appointed as provided in this chapter by said board in any such judicial circuit; also, over the number of names on the annual jury list compiled as provided in section 497.130, which shall in no case be less than twenty-five thousand, and over the lists and records of jurors and the allowance of exemptions and excuses from jury service, and to see that all laws relative to juries and jury duty are faithfully complied with.

2. It shall also be the duty of said board to see that names of persons selected for service as grand jurors in any such judicial circuit are made into a separate list and stricken from the general list in the office of the

said board of jury supervisors, and that all such persons are excused from petit jury service, during the time their names are on such grand jury list.

497.040. Appointment of jury commissioner.—Within sixty days after the effective date of this chapter, the said board of jury supervisors, or a majority of them, shall appoint a jury commissioner who shall have been a resident of such judicial circuit for at least five years preceding his appointment.

497.050. Removal of jury commissioner—deputy to serve, when—board to fill vacancy.—1. The jury commissioner so appointed shall hold office at the pleasure of the board of jury supervisors. The said board of jury supervisors shall have power at any time to remove such jury commissioner for any cause by said board, or a majority of them, deemed sufficient, by an order entered on the records of said board declaring the fact of such removal.

2. In the event of the sickness, absence or disability of the jury commissioner, the board of jury supervisors shall designate a deputy to perform the duties of jury commissioner.

3. The appointment or removal of such jury commissioner shall be certified by the chairman of said board, to the county court of said judicial circuit. In case of any vacancy occurring in said office of jury commissioner, it shall be the duty of said board to fill such vacancy by appointment of some other person possessing the proper qualifications, in like manner as herein provided.

497.060. Jury commissioner to take oath of office.—Before entering upon the duties of his office the person so appointed jury commissioner shall take and subscribe before the presiding judge of circuit court of such judicial circuit, an oath or affirmation to support the Constitution of the United States and of this state, and to demean himself faithfully in office.

497.070. Salary of jury commissioner.—The jury commissioner shall receive a salary of six thousand six hundred dollars per annum, payable in equal monthly installments at the end of each month. The salary shall be paid by the county in which the judicial circuit is located.

497.080. Deputy jury commissioners, appointment, oath of office, duties.—1. The board of jury supervisors shall, from time to time whenever necessary for the proper discharge of their duties, appoint two or more deputy jury commissioners, one of which shall be designated as chief deputy. The appointments shall be entered in the record of the board, and a certified copy thereof shall be filed with and preserved by the registrar.

2. Each deputy before entering upon his duties as such, shall take and subscribe before the presiding judge of the circuit court an oath or affirmation to support the Constitution of the United States and of this state and to demean himself faithfully in office. Each deputy shall obey the lawful orders of the board and the jury commissioner pertaining to the proper execution of his duties.

497.090. Salary of deputies.—Each of the deputies who are regularly employed throughout the year shall receive for his services a salary not exceeding three hundred dollars per month except the chief deputy who shall receive a salary not exceeding three hundred fifty dollars per month; and each of the deputies who are employed for temporary purposes shall receive a salary not exceeding ten dollars per day for each and every day he is actually

employed in performing his duties as such. The amount of the salary shall be fixed by the board in each case and the salaries shall be provided for and paid monthly by the county in which the judicial circuit is located, in like manner as herein provided for the payment of the salary of the jury commissioner.

497.100. Meetings of board of jury supervisors.—The said board of jury supervisors shall hold meetings at least once every three months, and at any other time on call of the chairman of said board or on call of any two members of the said board whenever the business of the said board may require it.

497.110. Jury commissioner to be secretary of board of supervisors.—The jury commissioner shall be the secretary of the said board of jury supervisors, and shall perform such functions as such secretary, as may be required of him by the said board.

497.120. Reports of jury commissioner.—1. It shall be the duty of said jury commissioner at least once every three months, to make a report in writing, of his proceedings as such jury commissioner. Such report shall be presented to said board during the session thereof, and shall be by order of said board entered upon the records thereof. Said report shall show, among other things, the number of jurors called for service, the number who served, the number excused, the number of jurors furnished by said jury commissioner for service in the several courts.

2. Said jury commissioner shall, within a week after the first day of September, including the year in which he shall be appointed, make a report in writing, of his proceedings as such jury commissioner during the twelve months next preceding the thirty-first day of August in said year. Such report shall contain a statement of the

expense of his office, the number of deputies employed and the time during which each of them was employed, and the compensation received by them and a summary of the items of the quarterly report.

497.140. Lists of prospective jurors, how kept—data processing equipment authorized—court en banc to select data processing equipment—names selected in presence of board.—1. The jury commissioner shall have each name on the list of prospective jurors typed, imprinted or otherwise recorded upon a separate card of uniform size or upon data processing records and shall annually on or before October first of each year beginning on or before October 1, 1968, deposit all such cards in the jury wheel or in the automation data processing equipment provided for that purpose and shall thoroughly mix the same before drawing any of the prospective jurors' names from said wheel or automation data processing equipment. Said wheel, jury lists and records shall be securely locked and retained constantly under the control of the board.

2. It shall be the duty of the court en banc to select the automation data processing equipment authorized by this chapter.

3. No cards shall be placed in the jury wheel, nor jury records placed in the data processing equipment, unless done so in the presence of a majority of the members of the board of jury supervisors and no card or jury record shall be drawn therefrom unless done so in the presence of the members of said board.

497.160. General panel for all divisions of circuit court—excuses—judge may allow jurors to leave general jury quarters—jury wheel.—1. Where the circuit court is composed of more than one division except as herein provided, one general panel of jurors shall be drawn for

all civil or criminal divisions, the number of names to be drawn for such general panel to be determined by the judge designated by a majority of the judges of the court. The panel shall be drawn and summoned as provided in sections 497.170 and 497.230, and all jurors so summoned shall appear before such judge of said circuit court, who shall hear and determine whether jurors shall be excused from service or excused to a day certain which shall not be for more than ninety days. Whenever any person summoned as a juror under this chapter shall be excused by the court from service to a later time certain, the court shall designate the time when he shall so serve, and the jury commissioner shall be notified thereof by the judge of the division of said court. The jury commissioner shall thereafter cause said juror's name to be included on a separate list for service on such later date. All persons desiring to be excused from serving as jurors shall present their application to the judge having charge of such jurors.

2. Those not excused shall be retained as the general panel for all divisions of the court and shall be placed in charge of the sheriff, in quarters to be provided by him in the courthouse, there to remain except when actually engaged in the trial of a cause, or thereafter excused by a judge of the court. A judge of the court may allow jurors to remain away from the general jury quarters, provided such jurors shall be promptly available for service at the trial of a cause. Any juror who is so allowed to remain away from the general jury quarters for one or more full days shall not be entitled to any compensation for jury service during such day or days.

3. The name of each juror so enrolled upon such general panel, having been typed or imprinted on a card of uniform size and kind, shall by said jury commissioner

in the presence of a judge or sheriff of said court be placed in a small jury wheel which shall be in charge of said jury commissioner to await, under lock, assignment for jury service in the respective divisions.

497.170. Panel of petit jurors—selections—excuses.—1. Whenever any division of said circuit court shall require a panel of petit jurors for jury service, the judge of such division shall designate the number of jurors required and make a requisition therefor upon the jury commissioner in charge of the small jury wheel. Upon receipt of such requisition, the said jury commissioner, in the presence of a sheriff of said court, shall turn said wheel and thoroughly mix the cards therein and, being so situated as to be unable to see the names on said cards, shall publicly draw from said wheel a number of cards equal to the number of petit jurors so required.

2. Such jury commissioner shall then make a list of the names of said jurors so drawn and the sheriff of said court shall cause the jurors whose names are thereupon to appear before the judge of the division so requesting such panel of jurors so drawn to be placed in a sealed envelope and delivered by the sheriff to the judge of said division of said circuit court requesting such panel. The judge of the division of said circuit court so requesting such panel shall cause the list of jurors so furnished to be compared with the cards so received and he shall retain the cards bearing the names of such jurors as may be retained for jury service in said division of said court.

3. Whenever any juror upon such panel shall be excused from further service in said division, such juror shall be directed to return to the quarters provided for the panel of jurors and to report to the sheriff in charge thereof and the card bearing the name of such juror shall be returned to the jury commissioner in charge of said

small jury wheel and be promptly replaced in said wheel; provided, that the judge of any division thereof may cause to be drawn and summoned a general panel of jurors for service in such division of said court; the number of jurors so drawn and summoned to be determined by such judge.

4. The judge of the division of said court for which said general panel of jurors was so drawn and summoned shall determine all excuses and shall designate the clerk to be in charge of a small jury wheel. The cards bearing the names of all jurors remaining upon such general panel shall be placed in a small jury wheel and such panels of petit jurors as may be required for service in such service in such division shall be selected by means of said small jury wheel in the same manner, as near as possible, in all respects, as is herein provided for the selection of petit jurors from a full panel of jurors, drawn and summoned for service in all divisions of said circuit court.

497.180. Extra jurors for trial of particular cause.—When a jury for the trial of a cause cannot be made up from the regular panel, the judge of the court, before whom the cause is pending, by agreement of all the parties thereto, or their attorneys, may make out and deliver to the proper officers a list of jurors, sufficient to complete the panel, but such extra jurors shall be summoned only for the trial of that particular cause.

497.190. Names of jurors returned to wheel, when.—The name of every juror drawn for a special venire, and every juror excused by the court from attendance or service shall be returned to the wheel from which it was drawn, unless the judge shall order to the contrary; the jury commissioner shall erase from the list required to

be kept by him the name of any juror that shall be so ordered not returned to said wheel.

497.201. General provisions as to disqualification and exemption apply.—The provisions of sections 494.010, 494.020, 494.031 and 494.040, RSMo, relating to the qualifications and disqualifications of jurors and exemptions from service as a juror, shall be applicable to jurors drawn and selected under the provisions of this chapter.

497.210. Challenge for cause.—Any party may challenge any juror for cause for any reason mentioned in sections 494.010 and 494.020 and for any other causes authorized by the laws of this state.

497.230. Summons, how served.—Summons for jury duty may be served by the sheriff or by using the United States mail. Actual receipt of summons by mail by the person summoned for jury duty or by some member of his family over the age of fifteen years shall be lawful service.

497.240. Courts may direct number of jurors to be summoned and make rules for their service.—Each of said courts herein referred to may direct, from time to time, the number of jurors to be summoned for said court, and how long they shall be summoned before their attendance shall be required, and may make such rules and orders as it may deem proper, touching the jury service of the court, not inconsistent with the provisions hereof, and may enforce same by attachment and fine not exceeding one hundred dollars.

497.250. Consecutive time petit juror may serve.—No petit juror shall be permitted to serve on such jury for more than one consecutive week during any term of court; provided, that in no case shall this section cause

the discharge of any juror during the actual pendency of the trial of any cause.

497.260. Special grand jury list.—1. The circuit judges shall from time to time select the names of six hundred persons, known or believed by them to be in every way fitted for grand jury service, said selection to be repeated whenever deemed necessary by said judges of the circuit court, which names shall, by said judges, be erased from the petit jury lists in the said board of jury supervisors' office, or caused by them to be erased by said jury commissioner, but by them to be deposited in a special grand jury wheel, which, after being properly secured, shall be delivered to the care of the jury commissioner of the board of jury supervisors, who shall be responsible for the proper custody of the same, and which after the names are once placed therein, shall be opened and drawn only, by said jury commissioner, or one of his deputies, in the presence of two or more of said circuit judges, upon requisition of the judge of the criminal division of the circuit court for such number of grand jurors as may be required for any one term in said court.

2. The board of jury supervisors shall have the power, from time to time, whenever it shall appear to their satisfaction that a juror selected for grand jury service has died, moved from the jurisdiction of the court, or become otherwise disqualified to cause the name of each and every such person to be removed from the said special grand jury wheel. The judges of the circuit court in general term shall be empowered to fill any vacancy in the grand jury list, and cause the names of the persons so selected as grand jurors to be deposited in said special grand jury wheel.

497.270. Selection of grand jurors.—The number of names of grand jurors to be thus drawn from said special

grand jury wheel shall not be less than twenty-four nor more than thirty-six for each of the September and March terms of said criminal division of the circuit court. If any of the persons whose names are drawn are unable to serve for any reason, the judge of the court may require that additional names be drawn but the total number of names from which the grand jury is selected at any term of court shall not exceed thirty-six. From the names thus drawn in the September term, the judge of the criminal division of the circuit court shall select twelve grand jurors who shall serve continuously throughout the said September term and the succeeding November and January terms and until a new grand jury is summoned and sworn in during the following March term. From the names thus drawn in the March term, the judge of the criminal division of the circuit court shall select twelve grand jurors who shall serve continuously throughout the said March term and the succeeding May term and until a new grand jury is summoned and sworn in during the following September term. In addition to the twelve grand jurors selected at the September and March terms, the judge shall also select at each such term alternate grand jurors who shall serve only if ordered by the judge to do so because of the death, disability or inability to serve of one or more regularly selected grand jurors. The names of such persons that have been drawn, but not selected to serve by said judge, shall be returned to the special grand jury wheel by the jury commissioner of the board of jury supervisors in the presence of one or more of said circuit judges immediately after the terms for which they were drawn.

497.280. List of 600 names to be deposited with the clerk of the circuit court.—The list of six hundred names selected by the circuit judges duly certified to by the

clerk of the circuit court shall be deposited with the clerk of the circuit court for the trial of criminal causes, immediately after said names are selected by the said circuit judges in general term.

497.290. Person or officer failing to perform duties—misdemeanor.—Any person or officer who shall fail to perform any of the duties required by this chapter shall be deemed guilty of a misdemeanor.

REVISED STATUTES OF MISSOURI, 1975 SUPPLEMENT:

494.020. Persons ineligible for service.—1. The following persons shall be ineligible to serve as a juror, either grand or petit:

(1) Any person who has been convicted of a felony, unless such person has been restored to his civil rights, or of a misdemeanor involving moral turpitude;

(2) Any person who is unable to read, write, speak and understand the English language;

(3) Any person on active duty in the armed forces of the United States or any member of the organized militia on active duty under order of the governor;

(4) Any licensed attorney at law;

(5) Any judge of a court of record;

(6) Any person who, in the judgment of the court or other authority charged with the duty of selecting jurors, is incapable of performing the duties of a juror because of mental or physical illness or infirmity;

(7) Any person not drawn or selected according to the applicable provisions, respectively, of chapter 540,

RSMo, as amended, relating to the selection of grand jurors; chapter 494, RSMo, as amended, relating to the selection of jurors in counties of the third and fourth classes; chapter 495, RSMo, as amended, relating to the selection of jurors in counties of the second class; chapter 496, RSMo, as amended, relating to the selection of jurors in counties now or hereafter containing a population of seven hundred thousand inhabitants or more; chapter 497, RSMo, as amended, relating to the selection of jurors in judicial circuits comprised of a county now or hereafter having a population of not less than four hundred and fifty thousand nor more than seven hundred thousand inhabitants; chapter 498, RSMo, as amended, relating to the selection of jurors in cities of more than five hundred thousand inhabitants; chapter 499, RSMo, as amended, relating to the selection of jurors in magistrate courts.

2. Any person who has served as a member of a grand jury panel within ten years next preceding his selection shall not be eligible for service as a grand juror.

494.031. Persons entitled to be excused from jury service.—The following persons shall, upon their timely application to the court, be excused from service as a juror, either grand or petit:

(1) Any person over the age of sixty-five years;

(2) Any woman who requests exemption before being sworn as a juror;

(3) Any person licensed to engage in and actually engaged in the practice of medicine, osteopathy, chiropractic or dentistry;

(4) Any person actually performing the duties of a clergyman;

(5) Any professor or teacher in any school or institution of learning;

(6) Any person who has served upon a regular state or federal petit jury panel within one year next preceding his application and if the jury be a magistrate jury drawn and selected under the provisions of section 499.010, RSMo, no person who has served upon a magistrate jury within one year next preceding his application;

(7) Any officer or employee of the executive, legislative or judicial departments of the federal, state, county or city government who is actively engaged in the performance of his duties;

(8) Any person whose absence from his regular place of employment would, in the judgment of the court, tend materially and adversely to affect the public safety, health, welfare or interest;

(9) Any person upon whom service as a juror would in the judgment of the court impose an undue hardship.

APPENDIX B

No. 39102

IN THE MISSOURI COURT OF APPEALS
ST. LOUIS DISTRICT
Division Four

STATE OF MISSOURI,
Plaintiff-Respondent,

v.

ANDREW LEE HARRIS,
Defendant-Appellant.

Appeal From the Circuit Court of the City of St. Louis
Hon. Lackland Bloom, Judge

OPINION

(Filed June 20, 1978)

The defendant-appellant, Andrew Lee Harris, was found guilty by a jury of robbery in the first degree, §560.120, RSMo. 1969 and was sentenced by the court to fifteen years imprisonment pursuant to the Second Offender Act, §556.280, RSMo. 1969. Defendant appeals.

Because one of the points assigned as error alleges that the identification procedure used was fatally flawed, it will be necessary to describe the circumstances of the crime and the later identification confrontation in some detail. In so doing, all evidence and favorable inferences tending to support the verdict are taken as true. State v. Harris, 452 S.W.2d 577 (Mo. 1970); State v. Oldham, 546 S.W.2d 766 (Mo.App. 1977).

A jury reasonably could have found the following.

At approximately 9:45 p.m. on the night of the crime, the victim, Isaac Guyton, was alone in his apartment. He allowed four people to enter: Doris Johnson, who was a friend of his, the appellant and two others. While the appellant brandished a knife at him, the victim was told by one of the four to lie on the floor. Shortly after that, a pillow case was placed over the victim's head and he was bound by a pair of suspenders. The victim, however, had an opportunity to view the appellant from a distance of about three feet for nearly two minutes before being restrained. The intruders proceeded to ransack the apartment and then departed. After their exit, the victim untied himself and looked out the front door. He saw one of the intruders putting some clothing into the car which then pulled away. Thereafter, the victim called the police who quickly arrived at the scene. The victim described the robbers, the goods taken and, with the greatest detail, the getaway car. A short time following, police officers stopped this car about a half mile from the scene. The appellant was in the front seat and Doris Johnson in the rear. Numerous articles taken from the victim's residence were also in the car. One of the officers questioned the four passengers, all of whom were then arrested and taken to the station along with the goods.

Once at the police station, the four suspects and at least some of their spoils were placed in a room where the confrontation procedure later took place. There was testimony by the victim that the police summoned him with the words, "we got the man that robbed you." The police apparently made no attempt to find others in the station of similar appearance to the appellant or the other suspects. Consequently, the actual confrontation included only the four suspects. The confrontation procedure was conducted

at about 10:55 P.M., a little more than an hour after the robbery occurred. The victim appeared and positively identified the appellant.

In this appeal, appellant alleges three points of error. In his first he contends that the trial court erred in overruling the motion to suppress the identification testimony of the State's witness, Isaac Guyton because the pre-trial confrontation procedure was so unnecessarily suggestive and conducive to irreparable mistaken identification as to be violative of the defendant's due process rights.

When an in-court identification is attacked on the ground that pretrial identification procedures violated due process, the inquiry extends first to a determination of whether the procedures were unduly suggestive, and if they were, whether there is an independent source of identification. State v. Barnes, 537 SW2d 576 (Mo.App. 1976). Proof of a source of identification independent of the confrontation itself is enough to overcome a claim of unnecessary suggestiveness in the identification procedure. State v. Jones, 528 SW2d 14 (Mo.App. 1975).[1]

We turn first, therefore, to an examination of the procedure employed in this case. Appellant specifically points out three circumstances which he claims make the confrontation procedure suggestive: 1) Appellant was placed in a pretrial confrontation room with Doris Johnson whom the police already knew had been named by the victim as an accomplice. 2) Stolen property was on

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1. Also see State v. Barnes, 535 SW2d 602 (Mo.App. 1976); State v. Johnson, 539 SW2d 493 (Mo.App. 1976); State v. Dancy, 541 SW2d 35 (Mo.App. 1976); State v. McFadden, 530 SW2d 440 (Mo.App. 1975); State v. Rutledge, 524 SW2d 449 (Mo.App. 1975); State v. Johnson, 522 SW2d 106 (Mo.App. 1975); State v. Ealey, 519 SW2d 314 (Mo.App. 1975); State v. Green, 515 SW2d 197 (Mo.App. 1974); State v. Hudson, 508 SW2d 707 (Mo.App. 1974).

the table in front of the appellant. 3) The police summoned the victim saying that they had the robber.

We need not reach the question of whether these circumstances give rise to an unnecessarily suggestive confrontation procedure. It is enough to note that the procedures used by the police in this case were less than exemplary.

Even assuming, but not holding, that the procedures used were unnecessarily suggestive, if the facts of this case indicate that the identifying witness had a sufficient basis in fact for an independent basis of identification then the suggestiveness of the procedure is overcome and the testimony admissible. *Jones*, supra.

To aid in this determination of whether there exists an independent basis, the U.S. Supreme Court in Neil v. Biggers, 409 U.S. 188, (1972), reiterated that the factors to be considered include:

> ". . . the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Id. at 199.

In the adjudication of this rule, the Missouri Courts have adopted a threefold test, articulated somewhat differently, but of the same scope and intent as in *Neil*, supra. State v. Parker, 458 SW2d 241 (Mo. 1970) stated that consideration be given to 1) the presence of an independent basis of identification, 2) the absence of any suggestive influence by others, and 3) positive courtroom identification.

Tested both by the factors laid down in *Neil* and those articulated in *Parker*, we turn to the facts at hand.

The record shows that the witness viewed the defendant in a well-lighted room at a very close range for several minutes apparently with a high degree of attention. The time elapsed between the incident and the confrontation was slightly longer than one hour. The witness was absolutely certain in his identification of the defendant at the confrontation. Furthermore, the witness testified that his recognition of the defendant was based on his "looks and features" and not on the basis of the articles on the table before him. Finally, at trial, the witness positively identified the defendant as the man who had robbed him.[2] Under these circumstances it is clear that there exists a sufficient basis for the identification independent of the arguably suggestive confrontation procedure. As such, there is little if any likelihood of misidentification. The trial court, therefore, did not err in admitting the identification testimony.

Appellant alleges as his second point of error that the trial court erred in overruling certain hearsay objections made by appellant's counsel during the direct testimony of two police officers. In each case, the officer on the stand was being questioned as to the replies he received from the occupants of the car concerning certain articles in the car. The statements contested as hearsay were, "[n]obody knew nothing about any of the property

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2. In his brief, appellant emphasizes that the witness wavered somewhat in his in-court identification of the defendant. Examination of the record indicates that the in-court identification was not absolute. The victim noted that the defendant's appearance had changed and that he could not recognize him exactly. He did, however, correctly point out the defendant. It is not fatal that, by reason of defendant's change in appearance over a long lapse of time, the witness' in-court identification is less absolute than the one made more than two years earlier at the original confrontation procedure. It is sufficient here, especially in view of the other indicia of reliability, that the victim was able to point out the defendant in court as the man who took part in the robbery.

that was in the car, . . ." and "[e]verybody in the car denied ownership of the property."

Hearsay evidence is testimony in court of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. Sabbath v. Marcella Cab Co., 536 SW2d 939 (Mo.App. 1976; Still v. Travelers Indemnity Co., 374 SW2d 95 (Mo. 1963); Bond v. Wabash R. Co., 363 SW2d 1 (Mo. 1962); Mash v. Missouri Pacific R. Co., 341 SW2d 822 (Mo. 1960); McCormick on Evidence, 2nd Ed. §246. Tested by this definition, it is clear that the phrases spoken by the officers while on the stand were evidence of statements made out of court. The crucial inquiry, then, is whether the statements by the occupants of the car to the effect that they neither owned nor knew about the stolen items were indeed offered to prove the fact that they neither owned nor knew about those items. We conclude that it is unlikely that the State would introduce evidence which would tend to exculpate by negativing knowledge. It is clear from the record that the statements were not offered to show inferentially, as appellant contends, that since the others in the car denied ownership of the items, the property was in the defendant's possession. The replies to which the officer on the stand testified do not indicate that it was only the "others" who denied ownership or disclaimed knowledge but, on the contrary, that "everybody" denied ownership and "nobody" knew anything concerning the ownership of the property. The statements, therefore, were not introduced for the purpose of proving the truth of the matters asserted therein. As such, they were not hearsay and any objection on that ground was properly overruled by the trial court.

Appellant's third point claiming that the Missouri jury selection provision which excuses women from service upon request is violative of the equal protection clause of the Fourteenth Amendment is likewise without merit. It is apparently appellant's contention that the requirement that a petit jury be selected from a representative cross-section of the community, which is fundamental to the jury trial guaranteed by the Sixth and Fourteenth Amendments, was violated in the selection of the jury that found him guilty.

The constitutionality of a statute is considered in light of the party seeking to raise the question and of the particular application of the statute to him. A constitutional attack may not be made by one whose rights are not, or are not about to be adversely affected by the operation of the statute. State v. Brown, 502 SW2d 295 (Mo. 1973) cert. denied 416 U.S. 973, 94 S.Ct. 1999, 40 L.Ed2d 562; See also Kansas City v. Douglas, 473 SW2d 101 transferred to 483 SW2d 760 (Mo. 1971); State v. Toliver, 544 SW2d 565 (Mo. banc 1976).

Appellant must allege, therefore, that he has been adversely affected by the application of the rule he challenges, i.e. that the Missouri jury selection process worked to compose a jury which, in this case, did not come from a representative cross-section by reason of the fact that women are excused upon request. The record in the instant case, however, shows the contrary to be true.

On the appellant's first jury panel of 18, 13 were women and on the second panel of 17, 12 were women. As a result, from a total of 35 potential jurors, 25 were women. It should also be noted that the jury finally sworn was comprised of 11 women and one man.

It is clear that defendant has failed to show that he was prejudiced by the operation of this statute. We hold, therefore, that he lacks standing to challenge its constitutionality.

Moreover, even if this selection process were found to be unconstitutional on the facts of another case, it is difficult to see how the defendant in the instant case was prejudiced by a jury selection panel which consisted of 25 women and 10 men.

The judgment is affirmed.

/s/ Robert G. Dowd
Robert G. Dowd, Presiding Judge

Robert O. Snyder (Judge) Concurs

Alden A. Stockard (Special Judge) Concurs

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-6067

BILLY DUREN,

Petitioner,

—v.—

STATE OF MISSOURI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I.

IN JACKSON COUNTY, MISSOURI, THE WOMAN WHO DOES NOT SEEK JURY SERVICE IS ROUTINELY LEFT OUT IN THE SELECTION PROCESS; NO AFFIRMATIVE STEP IS REQUIRED ON HER PART, SHE IS AUTOMATICALLY DEEMED UNAVAILABLE.

In a vain attempt to diminish Taylor v. Louisiana, 419 U.S. 522 (1975),

respondent presses a distinction between Louisiana's former opt-in system for women jurors, and Missouri's opt-out variant. In Missouri, respondent asserts, women "are excused from jury service only when they take affirmative steps to notify the court that they do not wish to serve." R.Br. 8. Incredibly, in light of undisputed fact, the point is pushed with specific reference to the county involved here: "In Jackson County . . . [e]ach year [a woman] must take affirmative steps to avoid jury duty." R.Br. 4. But whatever efforts may be made in other parts of the state to encourage women to serve,[1] it is crystal

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[1] E.g., in St. Louis, where the case described in R.Br. 12 n.5 (opinion set out R.Br. App. B) was tried. Absent from respondent's reference to recent St. Louis experience is any acknowledgement of large differences in post-Taylor practices of jury commissioners there and in Jackson County, where petitioner Duren was tried. First, the questionnaire set out in Mo. Rev. Stat. § 497.130 (Supp. 1975), eliciting the sex of the addressee and three times flagging the expendability of females as jurors, is mandated for Jackson County only. Second, respondent has not considered it appropriate to inform this Court whether, outside Jackson County, jury commissioners follow the convenient practice, adhered to in Jackson County, of excluding from service any woman who fails to appear in response to the summons. See A. 17-18, 20, 34.

Asked to amplify R.Br. 12 n.5, respondent would no doubt confirm that 1) the Jackson County questionnaire is not used in St. Louis, and 2) women in St. Louis are not assumed by their silence when summoned to have opted out. Cf. Report of St. Louis County Director of Court Administration Robert G. Ruhland, (footnote continued)

clear that Jackson County requires no step of any kind on the part of a woman who does not seek service.

On the contrary, the Jackson County woman who, like her pre-1975 counterpart in Louisiana, does nothing at all, never appears on a jury venire. If she returns no questionnaire, and does not respond to a jury service summons, then by respondent's own admission, she is deemed to have "exercised her right not to serve." R.Br. 5; A. 17, 20. In short, far from requiring females to step forward and affirmatively claim exemption, the Jackson County system leaves women out, unless they take affirmative steps to be included. A man who ignores a jury summons is subject to punishment for contempt;[2] a woman who does the same thing is chivalrously deemed unavailable. A. 17, 20. But see Porter v. Freeman, 577 F.2d 329, 332 n.7 (5th Cir. 1978) ("Indeed, any presumption against women's availability for jury service would run afoul of Taylor v. Louisiana . . . ."). Beyond question, a system so rooted in "a traditional way of thinking about females"[3] deliberately limits the kind of juror likely to hear a case.

(footnote continued)
Computer Expected to Speed Up Trial System, June 12, 1978, at 1, 16-18 (in St. Louis County, both questionnaire and summons use sex-neutral terms; neither indicates any woman's exemption).

[2] See Mo. Rev. Stat § 494.080.

[3] Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, J. concurring opinion).

II.

THE CONSTITUTION'S FAIR CROSS-SECTION REQUIREMENT IS VIOLATED WHEN (1) A SIGNIFICANT DISPARITY EXISTS BETWEEN THE DEMOGRAPHIC PATTERNS IN A COUNTY AND THE RELATIVE PERCENTAGES OF EACH COGNIZABLE DEMOGRAPHIC GROUP ON THE JURY LISTS, (2) A NON-NEUTRAL SELECTION CRITERION IS EMPLOYED, AND (3) THE STATE ESTABLISHES NO JUSTIFICATION FOR THE DISPARITY OR THE CRITERION.

It bears emphasis that the Jackson County figures introduced in this case were undisputed: less than 30% of the persons on the 1976 master wheel, and only some 15% of those appearing for jury duty, were women. This, according to respondent, is a "fair cross section." R.Br. 5-6. It should suffice to point out that a proportion double that of Jackson County has been authoritatively held a substantial underrepresentation establishing a prima facie case under this Court's precedent. Porter v. Freeman, 577 F.2d 329, 332 (5th Cir. 1978)(female population 53.8%, female representation on jury roll 33.4%).

In an argument of extraordinary fancy, respondent asserts the absence of an established causal link between the low "percentage of women who actually appeared in court" and the multiple, sex-specific drop-out invitations extended to Jackson County females. R.Br. 15. Carrying the caprice further, respondent suggests that

this Court indulge an inference "from the evidence" that women "excused after receiving the summons had reasons other than their sex-related exemption." R.Br. 17. But precisely the opposite inference is made in Jackson County: a woman who does not appear in response to the summons is assumed to have exercised her sex-related exemption. A. 17-18, 20, 34. Indeed, the assumption in which respondent now seeks refuge, i.e., that generally women who disregard the summons may be deemed to qualify for a sex-neutral (occupational or age) exemption (R.Br. 15), is patently insupportable. A stipulation between Prosecuting Attorney and Public Defender in a contemporaneous Jackson County case raising the same sixth/fourteenth amendment issue, Combs v. Missouri, No. 77-7012 (cert. filed June 30, 1978), is revealing in this regard. The stipulation, which is appended to the petition for certiorari in Combs, shows that of 30,165 women who returned questionnaires used to compile the 1976 Jackson County master jury wheel, only 3,342 affirmatively indicated a willingness to serve, smaller numbers indicated any basis for occupational, age or infirmity exemptions, but 21,884 (approximately 72.5%) indicated they "declined to serve for no other apparent reason than the female exemption."[4]

Moreover, as the Memorandum for the

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[4]The relevant portion of the stipulation in Combs is set out in an Appendix to this Reply Brief. For a similar reference to a stipulation in a related case, see this Court's opinion in Taylor v. Louisiana, 419 U.S. 522, 524 & n.3 (1975).

United States as Amicus Curiae 22 n.28 graphically demonstrates, most of the occupations for which Missouri accords exemption are predominantly male. Further, there is no significant difference between the voter registration rate of Missouri women and men. P.Br. 4 n.2. And most significantly, experience in other states and in the federal courts makes it apparent that, despite a range of occupational exemptions as well as age, physical infirmity and child-care excuses, women serve in dramatically high numbers so long as no sex-specific, nonfunctional exemption is used to beckon them to avoid service. See Memorandum for the United States, supra, 29 n.35; P.Br. 24 n.23; 556 S.W.2d at 24 (dissenting opinion); Porter v. Freeman, supra.

Given the gross underrepresentation of the largest cognizable group in the community, and the concededly non-neutral selection system Jackson County employs, the burden was cast on respondent to rebut petitioner's clear showing of a violation of the fair cross-section rule. See Castaneda v. Partida, 430 U.S. 482, 495-99 (1977); Berry v. Cooper, 477 F.2d 322, 327 (5th Cir. 1978). It is hardly surprising that respondent attempted no such rebuttal. Nor is it any wonder that even before this Court, respondent offers no justification whatever for the multiple invitations not to serve extended to every jury-eligible woman in Jackson County. The only genuine explanation for the gross underrepresentation of females is Jackson County's fully automatic exemption for "any woman." And surely the Constitution's requirement of a fair cross section is not so toothless as to permit under the guise of "privilege"

automatic exemption for any large cognizable class, whether women, men, blacks, whites, Mexican-Americans.

In sum, the statistics before the Court lead inexorably to this conclusion: week after week in Jackson County criminal defendants are subjected to jury panels on which women are grossly underrepresented because they are 1) told they need not serve, 2) invited by questionnaire and summons to mail in their election not to serve, and 3) ultimately assumed, when they are silent, to decline to serve on the basis of their sex. Petitioner Billy Duren was tried for a serious crime. The Constitution guarantees him a jury drawn from a fair cross section of the community. Women constitute 54% of Billy Duren's community; they accounted for 9.4% (5 out of 53) of the panel from which his all-male jury was selected. The notion that the fair cross-section requirement was met in Billy Duren's case defies reason.

III.

SELECTION OF A PETIT JURY FROM A REPRESENTATIVE CROSS SECTION OF THE COMMUNITY IS PART OF THE DEFINITION OF THE CONSTITUTIONALLY-MANDATED JURY TRIAL RIGHT; "HARMLESS ERROR" ARGUMENT IS THEREFORE AS INAPPOSITE HERE AS IT WAS IN PETERS v. KIFF, 407 U.S. 493 (1972), AND TAYLOR v. LOUISIANA, 419 U.S. 522 (1975).

Taylor v. Louisiana leaves no corridor for respondent's argument that "violation of the cross-sectional standard" must go unchecked absent proof Duren was harmed thereby (R.Br. 6, 17-19). In Taylor, the Louisiana Supreme Court emphasized that defendant, a man charged with an aggravated kidnapping involving two women and a child, had "shown no prejudice" chargeable to Louisiana's exemption of women from jury service. 282 So.2d 491 (1973). Before this Court, the Louisiana Attorney General argued repeatedly that absent a showing of harm, Taylor's conviction should not be set aside "on the basis that there were not enough women on the jury roles [sic]." Brief of Louisiana, Appellee, Taylor v. Louisiana, at 18. The point was made with unmistakable clarity:

> [Taylor] makes no allegation that, had women been included, his trial would have been any more fair or impartial, nor that their absence caused him any harm. Id. at 17-18.
>
> [W]here we are dealing not with a prohibition against a class, but with an exemption, and not with racial discrimination, the State of Louisiana contends that appellant, who is not a member of the alleged absent class, must show some possibility of harm or prejudice to himself in order to have his conviction reversed. Id. at 21.

See also id. at 22-23 for further argument by Louisiana of the same style, content and quality.

Mr. Justice Rehnquist, sole dissenter in Taylor, observed (419 U.S. at 538-39):

> The Court's opinion reverses a conviction without a suggestion, much less a showing, that the appellant has been unfairly treated or prejudiced in any way by the manner in which his jury was selected . . . .

Later, in his concise dissenting opinion, he reiterated: "[T]he criminal defendant involved makes no claims of prejudice or bias." 419 U.S. at 542. And, in conclusion. he stated: "Absent any suggestion that appellant's trial was unfairly conducted, or that its result was unreliable, I would not require Louisiana to retry him . . . ." 419 U.S. at 543. But eight members of this Court firmly rejected that position. Citing Peters v. Kiff, 407 U.S. 493 (1972), the majority held Taylor was entitled to tender and have adjudicated the claim that he was constitutionally entitled to a jury drawn from a venire constituting a fair cross section of the community. 419 U.S. at 526. The Court emphasized that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial" (made applicable to the states via the fourteenth amendment). 419 U.S. at 528.[5] Absence of this essential

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[5]Respondent (Br. 10-12) appears to tender the argument, extraordinary after Duncan v. Louisiana, 391 U.S. 145 (1968), Williams v. Florida, 399 U.S. (footnote continued)

component, regardless of the quality of the criminal proceeding in other respects, necessitates reversal of the judgment below.

In sum, as Peters and Taylor exemplify, this Court has never suggested that a ruling on the constitutionality of a jury selection system turns on any showing of prejudice to the defendant. For a state's failure to adhere to the fair cross-section requirement in a particular case is inherently indeterminable in prejudicial impact.[6]

(footnote continued)
78 (1970), and, most particularly, Taylor v. Louisiana, 419 U.S. 522, 530 (1975), that only the concept of "ordered liberty," not sixth amendment strictures, should be the focus of decision. The court below entertained no such misapprehension. It recognized, as this Court's precedent requires it to, that the issue is the fourteenth amendment due process principle "as that principle embodies fulfillment of the Sixth Amendment [jury trial guarantee]." 556 S.W.2d at 11 (emphasis supplied). It is far too late in the day to invite the Court to restore in this area the amorphous, ad hoc approach of determining, based on the peculiar circumstances surrounding each individual case, whether "ordered liberty" has been undermined.

[6]It is hardly surprising that respondent, as prosecutor, views the evidence as "overwhelming," sufficient to establish guilt beyond a reasonable doubt "regardless of the composition of the jury." R.Br. 18-19. But it is not the prosecutor's function to make that judgment. Nor is it the function of a judge. Petitioner denied his guilt, asserted a defense, and called witnesses who testified to his
(footnote continued)

Judicial speculation on the result had defendant been accorded his constitutional right in regard to jury selection not only would impose on appellate courts a function inappropriate for them,[7] it would be tantamount to a directed verdict of "guilty." See Mause, Harmless Constitutional Error: The Implications of Chapman v. California, 53 Minn. L. Rev. 519, 541-42 (1969). In accordance with this Court's long and

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(footnote continued)
absence from the scene of the crime. The sixth amendment safeguards his right to have a jury, drawn from a fair cross section of the community, not the prosecutor or the judge, determine witness credibility and the weight each item of evidence merits.

Following the trail respondent takes, a jury selection system, however discriminatory, would be invulnerable, indeed, the jury could be dispensed with entirely, so long as the prosecution persuaded the judge evidence of guilt overwhelmed. But regardless of the strength of the prosecutor's case, a criminal defendant in our system is entitled under the Constitution to a jury trial; by definition, that means a jury drawn from a fair cross section of the community.

[7]I.e., the formidable task of divining in every appeal involving a challenge to the composition of a jury, how a different jury--one selected in a manner consistent with the Constitution, potentially including persons from a group or groups left out at trial--might conceivably respond. A seer might find herself equal to the task; a judge who cannot see through the eyes of another, particularly one of dissimilar sex, race, background and experience, should find the assignment impossible.

consistent treatment of the question, therefore, a harmless error rule may not be applied in this case.

CONCLUSION

For the reasons presented by petitioner, the decision below should be reversed, and the jury service exemption for "any woman" mandated by Mo. Const. Art. I, § 22(b), and Mo. Rev. Stat. § 494.031(2) should be declared unconstitutional.

Respectfully submitted.

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APPENDIX

APPENDIX

Extract from Stipulation appended to the petition for certiorari in Combs v. Missouri, No. 77-7021 (cert. filed June 30, 1978)

[The Stipulation, dated December 14, 1976, and filed in the Circuit Court of Missouri, Sixteenth Judicial Circuit, is signed by Assistant Prosecuting Attorney George Ely, Jackson County Courthouse, Kansas City, Missouri, and Assistant Public Defender William Lopez, Kansas City, Missouri.]

. . .

3. On February 4, 1976, the Office of the Public Defender for the Sixteenth Judicial Circuit was authorized to obtain from the Jackson County Circuit Court Administrator all "Official Notice and Questionnaire" forms which were received, processed and used to compile the 1976 Jury Wheel for Jackson County. On February 11, 1976, the Office of the Public Defender received all such questionnaires from the Office of the Circuit Court Administrator.

The questionnaires were so sorted to separate those sent to males from those sent to females. Questionnaires sent to females were sorted to determine the following information and counted in each category thereby obtaining the following totals:

Category	Total Number of Questionnaires
Information on the face of the questionnaire showing that the woman was no longer a resident of Jackson County, Missouri	817

[Category]	[Total Number of Questionnaires]
Female government employees who indicated they would not serve	21
Female professionals, including clergy, who indicated they would not serve	93
Females who indicated prior jury service on the questionnaire (Line 12) but indicated they were willing to serve	132
Females who indicated prior jury service but were not willing to serve	20
Female teachers who indicated they would not serve	437
Questionnaires indicating that the addressee was in a nursing home	50
Questionnaires indicating in Line 11 that the woman was physically unable to serve or some other written indication of physical infirmity such as loss of hearing, or who indicated they were ineligible under the statutes	1,106
Questionnaires showing that the woman was over 65 years of age and with no affirmative indication of willingness to serve	2,059

[Category]	[Total Number of Questionnaires]
Questionnaires showing that the woman was under 21 years of age	151
Questionnaires returned with the notation that the addressee was deceased	53
Questionnaires indicating that the woman declined to serve for no other apparent reason than the female exemption	21,884
Questionnaires with affirmative indications that the woman would serve, or without any indication of refusal	3,342

4. The Court may take judicial notice of the Department of Commerce, Bureau of Census, statistics contained in attached Exhibit "E," which is hereby incorporated by reference, entitled "General Population Characteristics."

No. 77-6067

In the Supreme Court of the United States

OCTOBER TERM, 1978

BILLY DUREN, PETITIONER

v.

STATE OF MISSOURI

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-6067

BILLY DUREN, PETITIONER

v.

STATE OF MISSOURI

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether Missouri's statutory and constitutional scheme for the selection of petit jurors, which grants an automatic exemption to women based solely on sex, deprived petitioner of due process of law.

INTEREST OF THE UNITED STATES

Congress has declared, as the policy of the United States, that all litigants in the federal courts entitled

to trial by jury have the right to grand and petit juries "selected at random from a fair cross section of the community * * *." 28 U.S.C. 1861. Congress also has expressly forbidden discrimination on the basis of sex in the selection of grand or petit jurors in the federal courts. 28 U.S.C. 1862. Through operation of the Due Process Clause of the Fourteenth Amendment, the states are also constrained by the requirement of the Sixth Amendment that jurors be selected from a fair cross section of the community. *Taylor* v. *Louisiana*, 419 U.S. 522. The United States has an interest in cases involving the interpretation of the "fair cross section" rule.

In addition, Title IX of the Civil Rights Act of 1964, 78 Stat. 266, as amended, 42 U.S.C. (Supp. V) 2000h-2, provides that the Attorney General may intervene in any action in federal court that alleges a denial of equal protection of the laws on account of sex and that the Attorney General certifies is of general public importance. The United States has been permitted to intervene in actions alleging discrimination in jury selection.[1] Although petitioner asserts that his right to due process of law has been denied through underrepresentation of women on the petit jury panel, equal protection principles are involved in the requisite determination whether petitioner has established a *prima facie* case.

STATEMENT

1. Petitioner was indicted in the Circuit Court of Jackson County, Missouri, for first degree murder

[1] See, *e.g.*, *Turner* v. *Spencer*, 261 F. Supp. 542 (S.D. Ala.).

and first degree robbery (Pet. App. A1). Prior to trial, petitioner moved to quash the petit jury panel on the ground that women were systematically excluded from jury service. After a hearing, the trial judge denied the motion (*id.* at A2). Petitioner was then tried and convicted by an all-male jury (*id.* at A7). Following his trial, petitioner moved for a new trial, again alleging that he had been denied due process because of the systematic underrepresentation of women on the jury panel. The court denied the motion and sentenced petitioner to two terms of life imprisonment (*id.* at A1).

Petitioner appealed his conviction to the Missouri Court of Appeals, Kansas City district, which transferred the case to the Missouri Supreme Court pursuant to Art. 5, § 3, Mo. Const., as amended (1976) (Pet. App. A1). That court affirmed the conviction on September 27, 1977, and denied a motion for rehearing on October 11, 1977.

2. The State of Missouri grants women an automatic exemption from jury service solely on the basis of sex under Art. 1, § 22(b), Mo. Const.,[2] and Mo. Ann. Stat. § 494.031(2) (Supp. 1978).[3] Women were entirely excluded from jury service in Missouri

[2] "No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror."

[3] "The following persons shall, upon their timely application to the court, be excused from service as a juror, either grand or petit; * * * (2) Any woman who requests exemption before being sworn as a juror; * * *"

until 1945, when the present version of Art. 1, § 22 (b), Mo. Const., was adopted.

Pursuant to statute, Mo. Ann. Stat. § 497.130 (Supp. 1978), prospective jurors in Jackson County are mailed a questionnaire that contains the following notice:

> TO WOMEN:
>
> The constitution permits women to elect to serve or not to serve as jurywomen. Any woman who elects not to serve will fill out this paragraph and mail this questionnaire to the jury commissioner at once. It will not be necessary to answer the other questions.
>
> I elect not to perform jury service.
>
> _____
>
> (Signature)

The questionnaire also includes questions designed to elicit the sex of the respondent and directing attention to the exemption for women.[4]

At the hearing on his pre-trial motion to quash the jury panel, petitioner presented the testimony of John Fitzgerald, a Jackson County Jury Commissioner. Fitzgerald testified that questionnaires are sent to potential jurors randomly selected from Jackson County voter registration lists and that questionnaires returned showing no exemption and those not returned are placed on the jury wheel (Pet. App. A7). Each week names are randomly selected from the wheel to be sent summonses for jury service. The summons reads in part:

> Women, if you do not wish to serve, return this summons to the Judge named on the reverse side as quickly as possible.[5]

If a woman fails to respond to the summons, the jury commissioners assume that she has exercised her option not to serve (*ibid.*).

Petitioner also introduced statistical evidence concerning the percentages of women appearing for service on Jackson County jury panels for the period of June 1975 through March 1976. This evidence, which was not contested by the State, revealed the following percentages of women reporting for jury service: June 1975—15 percent; July 1975—15.1 percent; August 1975—13 percent; September 1975—13.7 percent; October 1975—10.9 percent; January 1976—12.3 percent; February 1976—17.6 percent; March 1976—15.5 percent. The proportion of women over the entire period averaged 14.5 percent. Petitioner's venire of 53 included five women, or only 9.4 percent. His jury of 12 was all male (Pet. App. A7).

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[4] "(1) Please state your sex. Male ( ) Female ( ) (If you are female and do not wish to serve, see bottom of questionnaire) * * *.

"(7) If you are a female * * * then under the law of Missouri, you cannot be compelled to serve as a juror, so state if you will serve. Yes ( ) No. ( )."

Other exemptions are not similarly emphasized. The only other notice of exemption is directed to "men over 65."

[5] Men seeking exemption from jury service are informed by this summons that they must make application to the judge for "sufficiently valid reasons" by the Thursday before their appearance date or by personal appearance before the judge.

At the hearing on his motion for a new trial, petitioner introduced evidence indicating that the 1976 jury wheel for Jackson County was 29.1 percent women (Pet. App. A7). Petitioner also introduced data from the 1970 Census showing that the population of Jackson County over the age of 21 was 54 percent women (*id.* at A6). This evidence again was not rebutted by the State.

3. In affirming petitioner's conviction, the Missouri Supreme Court held that the automatic exemption of women from jury service violated neither due process nor equal protection. The court asserted that the right of women in Missouri to serve on juries was not restricted, since they were merely granted a "privilege" not to serve (Pet. App. A5-A6). Discussing at length the facts in *Taylor* v. *Louisiana*, 419 U.S. 522, the court distinguished *Taylor* on two grounds: (1) Missouri did not require women to volunteer for jury service, and (2) the figures of 29.1 percent women on the Jackson County jury wheel and 14.5 percent women appearing for jury duty were "dramatically higher" than the relevant percentages for St. Tammany's Parish, Louisiana (Pet. App. A6-A7).[6]

The Missouri Supreme Court also questioned the validity of petitioner's statistics, even though the State had declined to introduce any evidence at either of the two hearings in the trial court. In particular,

[6] The jury wheel of St. Tammany's Parish included no more than 10 percent women and less than 1 percent of the jurors summoned during a ten and a half month period were women.

the court below questioned the accuracy of 1970 census figures (Pet. App. A6) and speculated that the percentage of women appearing for jury duty might have been reduced through the operation of other exemption provisions (*id.* at A7-A8).[7] The court held that petitioner's statistics did not establish a *prima facie* case of underrepresentation of women because Missouri's sex-based exemption did not involve subjective standards or purposeful discrimination (*id.* at A8).

Finally, after acknowledging that petitioner may have lacked standing to raise the claim, the Missouri Supreme Court addressed the issue of equal protection

[7] Exemptions are provided under Mo. Ann. Stat. § 494.031 on request to those over 65, women, doctors, chiropractors, dentists, clergymen, professors and teachers, persons who have served as jurors within the preceding year, and officers or employees of government bodies.

In addition, members of the armed forces, lawyers, judges, convicted felons, and illiterates are ineligible for jury service under Mo. Ann. Stat. § 494.020 (Supp. 1978).

The validity of these exemptions for members of occupational classes is not at issue in this case. Similar exemptions have been upheld on grounds that they do not undermine a fair cross section, *Taylor* v. *Louisiana*, *supra*, 419 U.S. at 534, and that the uninterrupted service of such occupational groups serves the public welfare. *Rawlins* v. *Georgia*, 201 U.S. 638; *United States* v. *Horton*, 526 F.2d 884 (C.A. 5), certiorari denied, 429 U.S. 820 (sole proprietors); *United States* v. *Test*, 550 F.2d 577 (C.A. 10) (sole proprietors); *Government of the Canal Zone* v. *Scott*, 502 F.2d 566 (C.A. 5) (military personnel); *United States* v. *Catena*, 500 F.2d 1319 (C.A. 3), certiorari denied, 419 U.S. 1047 (practicing physicians); *United States* v. *Ross*, 468 F.2d 1213 (C.A. 9), certiorari denied, 410 U.S. 989 (students).

(Pet. App. A9).[8] The court held that the State's jury selection system did not deny equal protection because there was no absolute exclusion of women and no "subjective discriminatory treatment" (*id.* at A10). Neither men nor women were found to suffer a constitutionally impermissible denial of equal protection as a result of the sex-based "privilege" (*ibid.*).

SUMMARY OF ARGUMENT

Missouri's automatic exemption of women from jury service on request violates the "fair cross section" requirement of the Sixth Amendment, applicable to the states under the Due Process Clause of the Fourteenth Amendment. The uncontradicted evidence presented by petitioner clearly established a substantial underrepresentation of women on the jury panels of the Jackson County Circuit Court. The trial court and the Missouri Supreme Court erred in holding that petitioner had failed to establish a *prima facie* case of underrepresentation of women.

Because the sex-based exemption appeared on the face of the statutes, petitioner had no obligation to establish that the percentage of women was reduced by the operation of subjective discriminatory standards. Petitioner has standing to raise the argument that the systematic underrepresentation of women on the Jackson County juror panels violates the Sixth

[8] The petition for a writ of certiorari presents no equal protection question.

and Fourteenth Amendment requirement that jurors be selected from a fair cross section of the community.

Under the Missouri system, the sex-based exemption provision operates at two levels: (1) before the jury wheel is drawn up, when women claim the exemption in response to the prominent notice on the questionnaire, and (2) prior to the appearance of jurors for service, when women are afforded an additional opportunity to refuse service by returning the summons or by simply not reporting for jury duty. Both these stages are equally effective in eliminating women from jury panels, each successively halving the percentage of women. The full effect of Missouri's sex-based exemption provision can therefore only be measured after it has completed its operation, when jurors report for jury duty.

In the absence of any contradictory evidence, the proof presented by petitioner was sufficient to establish a *prima facie* case of a violation of the fair cross section rule. Petitioner carried the burden of proving the existence of a sex-discriminatory juror selection process, the percentage of women in the county population, and the percentage of women on the jury wheel and reporting for jury duty over a substantial and relevant time period. In the absence of any evidentiary showing by the State either that petitioner's statistics were faulty or that the gross underrepresentation of women on the jury panels resulted from neutral causes other than the sex-based exemption provision, the State failed to meet its burden of rebutting petitioner's *prima facie* case.

By holding erroneously that petitioner had failed to make a *prima facie* case, the Missouri Supreme Court avoided the question whether any adequate state interest justified the discrimination. Because the right to a jury selected from a fair cross section of the community is fundamental under the Sixth Amendment, the State must advance substantial reasons to support the automatic exemption of women. The only conceivable state interests, stereotyped notions concerning women's role in the home or sensibilities and administrative convenience, do not satisfy this standard.

ARGUMENT

I

THE ABSOLUTE EXEMPTION OF WOMEN FROM JURY SERVICE ON REQUEST UNDER MISSOURI LAW VIOLATES THE "FAIR CROSS SECTION" REQUIREMENT OF THE SIXTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A. The State's Blanket Exemption of Women Contravenes the Legal Principles Set Out in *Taylor* v. *Louisiana*

The State's automatic exemption of women from jury service solely on the basis of sex squarely violates the "fair cross section" rule as interpreted by this Court in *Taylor* v. *Louisiana*, 419 U.S. 522. *Taylor* held that the requirement that jurors be selected from a fair cross section of the community is fundamental to the jury trial guaranteed by the Sixth Amendment, as applied to the states through the Due

Process Clause of the Fourteenth Amendment. *Id.* at 530.[9] This Court also recognized that women comprise an identifiable group whose exclusion from or systematic underrepresentation on jury panels raises a substantial question under the fair cross section rule. *Id.* at 531. A criminal defendant who is male has standing to argue that the underrepresentation of women violates the fair cross section rule and denies him due process. *Id.* at 526. An exemption granted to women solely on the basis of sex must be justified by the state on more than rational grounds and cannot be upheld merely for reasons of women's presumed household obligations or administrative convenience. *Id.* at 534, 535. This Court held it impermissible for states to grant "automatic exemptions based solely on sex" if the result is jury venires that are "almost totally male." *Id.* at 537.

The Louisiana exemption of women from jury duty that this Court struck down in *Taylor* resembled Missouri's provision, but it operated at an earlier

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[9] The concept of a constitutional right to a jury selected from a fair cross section of the community first evolved in the context of equal protection challenges to the systematic exclusion of racial groups. See *Smith* v. *Texas*, 311 U.S. 128; *Hernandez* v. *Texas*, 347 U.S. 475. The requirement was then imposed on the federal courts pursuant to the supervisory powers of this Court. *Glasser* v. *United States*, 315 U.S. 60; *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217; *Ballard* v. *United States*, 329 U.S. 187. The fair cross section rule was eventually perceived as an essential element of the Sixth Amendment right to a jury trial, *Williams* v. *Florida*, 399 U.S. 78, applicable to the states under *Duncan* v. *Louisiana*, 391 U.S. 145.

stage in the juror selection process. Under Louisiana law,[10] a woman was required to file a written declaration of her willingness to perform jury service or her name would not be placed on the jury wheel. The result in St. Tammany's Parish was that less than ten percent of the persons on the 1972 jury wheel and less than one percent of the names drawn to sit on jury venires during the relevant period were female.

In an attempt to distinguish *Taylor*, the Missouri Supreme Court emphasized that no affirmative duty to register is imposed on women in Missouri since those who wished to serve on a jury need only decline to invoke the automatic exemption (Pet. App. A10). Regardless of the possible relevance of that point to an equal protection challenge raised by a potential female juror, it is without significance in the context of an asserted violation of the fair cross section requirement and the due process rights of a criminal defendant. The question before this Court does not

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[10] La. Const., Art. VII, § 41 read in pertinent part:

"The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service."

La. Code Crim. Proc. Ann., Art. 402 (1967) provided:

"A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service."

These provisions were repealed effective January 1, 1975.

concern the relative burdens on female and male potential jurors or the particular discriminatory mechanism by which a cognizable group is reduced or eliminated, but rather petitioner's right to have jurors on his venire selected from a fair cross section of the community. Missouri's facially discriminatory exemption for women reduces this large distinctive class by three-quarters to a small minority of jurors.

The court below also attempted to restrict *Taylor* to its narrow factual context, holding in essence, as the dissent stated, that "anything more than one percent women is constitutional" (Pet. App. A16). But *Taylor* held that if women are "systematically eliminated from jury panels" by means of a sex-based exemption from jury service, there is a violation of the Sixth Amendment's fair cross section requirement. 419 U.S. at 531. The Court remarked (*id.* at 538) that

> jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

The rationale of this decision is not limited to the facts only as they existed in St. Tammany's Parish, Louisiana. The opinion disapproves any juror selection system that treats women as a class (419 U.S. at 535) and plainly intended no difference between those, such as Louisiana's, that granted females an

"exclusion" and those, such as Missouri's, that accord women an "exemption" (*id.* at 537):

> [I]t is no longer tenable to hold that women as a class may be excluded or *given automatic exemptions based solely on sex* if the consequence is that criminal jury venires are almost totally male. [Emphasis added.]

Whatever the terminology employed or the details of the system devised to reach that result, jury panels averaging more than 85 percent men that predictably lead to all-male petit juries such as that which convicted petitioner are "almost totally male" and fail to be reasonably representative of the community, within the essential meaning of *Taylor*. This reduction of an easily identifiable, distinctive and large community group to an insignificant minority of jurors through the application of a discriminatory exemption provision contravenes the fair cross section rule.[11]

Following this Court's decision in *Taylor*, most states that provided automatic exemptions of women from jury service eliminated those exemptions either

[11] This Court recognized long ago that the presence of women on juries imparts "a flavor, a distinct quality" that may affect the "subtle interplay of influence" in jury deliberations. *Ballard* v. *United States, supra*, 329 U.S. at 193, 194. The Court took notice in *Taylor* (419 U.S. at 532 n. 12) of controlled studies of women as jurors that indicated the existence of "their own perspectives and values * * *." Such perspectives may be lost through submergence in an overwhelming male majority as well as by total exclusion.

by legislative [12] or judicial [13] action. Only the states of Missouri and Tennessee continue to provide women with automatic exemptions based solely on sex, and the Tennessee Supreme Court has recently termed the exemption "highly suspect" from a constitutional standpoint. *Scharff* v. *State*, 551 S.W.2d 671, 676.[14] The Missouri Supreme Court thus stands alone in upholding without reservation the constitutionality of automatic exemptions of women from jury duty, despite the clear constitutional guidelines announced in *Taylor*.

[12] Ga. Code Ann. § 59-124 (1965), repealed by Ga. Acts 1975, pp. 779-780; N.Y. Jud. Law § 599 McKinney, repealed by 1975 N.Y. Laws, ch. 4 § 3; R.I. Gen. Laws Ann. § 9-9-11 (1970), repealed by 1975 R.I. Laws, ch. 233, § 1.

A number of states have also recently replaced exemptions for mothers of minor children with sex-neutral excuses for persons with child-care responsibilities. Alaska Stat. § 09.20.030 (1973); Conn. Gen. Stat. Ann. § 51-219 (Supp. 1978); Mass. Gen. Laws Ann. ch. 234, § 1 (1974); Mont. Rev. Codes Ann. § 93-1304 (Supp. 1977); N.J. Stat. Ann. § 2A-69-2(g) (1976); N.Y. Jud. Laws § 599(7) McKinney; Okla. Stat. Ann. tit. 38, § 28 (Supp. 1977); Utah Code Ann. § 78-46-10 (1977); Va. Code Ann. § 8-208.6(26) (Supp. 1976).

[13] *People* v. *Moss*, 80 Misc.2d 633, 366 N.Y.S.2d 522; *State* v. *Gethers*, 139 Ga. App. 1, 227 S.E.2d 832.

[14] The Tennessee Supreme Court did not reach the question whether the automatic exemption violated the fair cross section rule because the criminal defendant had neglected to make any record concerning the effects of the statute and thus had not made a *prima facie* case. The opinion expressed regret that the state of the record precluded a decision on the merits and noted that "a continuing invitation to appellate review is presented by the unresolved status of woman jurors" post-*Taylor*. 551 S.W.2d at 676.

B. Petitioner Need Not Prove that the Discrimination was Subjective When the Juror Selection System was Facially Discriminatory

The Missouri Supreme Court attempted to distinguish *Turner* v. *Fouche*, 396 U.S. 346, and *Castaneda* v. *Partida*, 430 U.S. 482, on the grounds that those cases dealt with juror selection systems utilizing subjective criteria, resulting in the underrepresentation of racial or ethnic groups (Pet. App. A5, A8). In those cases, however, the surrounding circumstances supplied what the Missouri statute provides on its face: proof of class-based distinctions in jury selection. Had the statutes in *Turner* or *Castaneda* explicitly based jury selection on race or national origin, this Court would have disapproved them without any need to analyze other factors in the jury selection process. The fact that Missouri's sex-based provision is obvious and objective rather than subtle and subjective heightens rather than lessens the need for close constitutional scrutiny, especially when it results in the systematic underrepresentation of women in violation of the fair cross section rule. Louisiana's exemption for women in *Taylor* v. *Louisiana*, *supra*, also appeared on the face of the state's jury laws, but this Court nevertheless found a constitutional violation.

Because *de jure* racial discrimination in the selection of jurors has long been clearly illegal and a federal criminal offense since 1875,[15] it is not surprising that those cases dealing with the fair cross section

[15] 18 U.S.C. 243. See also *Strauder* v. *West Virginia*, 100 U.S. 303.

rule as applied to racial groups have concerned juror selection systems using more subtle discriminatory devices such as the "key man," [16] good character requirements,[17] peremptory challenges,[18] or selection from an unrepresentative pool.[19] The rule derived from these cases is that once a criminal defendant has made a *prima facie* showing that a large, distinctive group in the eligible population is substantially underrepresented in the juror pool, he need only show that there has been an opportunity for discrimination or that non-neutral factors have been employed. *Alexander* v. *Louisiana*, 405 U.S. 625, 630; *Castaneda* v. *Partida*, *supra*, 430 U.S. at 494. The burden then shifts to the state to attempt to explain that the disparity was caused by non-discriminatory reasons.

Missouri's automatic exemption for women solely on the basis of sex is just such a non-neutral factor that has resulted in a severe underrepresentation of women on Jackson County juror panels. This sex-based exemption appears on the face of the Missouri constitutional provision and implementing statute, is emphasized on the juror questionnaire and juror summons, and is applied by the Jury Commissioner and the state courts. As *Taylor* conclusively indicates, the

[16] *Cassell* v. *Texas*, 339 U.S. 282; *Castaneda* v. *Partida*, *supra*.

[17] *Hill* v. *Texas*, 316 U.S. 400; *Carter* v. *Jury Commission*, 396 U.S. 320; *Turner* v. *Fouche*, *supra*.

[18] *Swain* v. *Alabama*, 380 U.S. 202.

[19] *Whitus* v. *Georgia*, 385 U.S. 545.

fair cross section rule is violated by this type of explicit discrimination as well as by more subtle means.

C. Petitioner's Evidence Met the Standards for Establishment of a *Prima Facie* Case

The evidence presented by petitioner in the trial court revealed how Missouri's sex-based exemption, under Article 1, § 22(b) of the Missouri Constitution and its implementing statute, Mo. Ann. Stat. § 494-.031(2), provides for a two-stage process of elimination of women from juror pools. While the initial selection of potential jurors is made at random from voter registration lists, the questionnaire sent to those selected from the lists prominently features an invitation to women to excuse themselves from jury service. The effectiveness of this offer is reflected in statistics showing that the 1976 jury wheel included only 29.1 percent women, although the county's adult population was 54 percent female. Even more effectively reducing the number of women jurors was the second opportunity to claim the sex-based exemption by return of the juror summons, which also pointedly advised women of the automatic exemption. Adding to this reduction was the Jury Commissioner's practice of construing a woman's failure to report for jury duty as a claim of the sex-based excuse.[20] Petitioner demon-

[20] Under Missouri law, persons failing to report for jury service are subject to arrest and fine for contempt. Mo. Ann. Stat. § 494.080 (1952). The Jury Commissioner testified that when women failed to appear he assumed that they had claimed an exemption whether or not they had returned the summons.

strated that this second operation of the discriminatory exemption dramatically reduced the number of women on jury panels to a mere 14.5 percent during the nine-month period preceding his trial. The predictable result is a large number of all-male petit juries, such as the one that tried and convicted petitioner.

The full impact of the sex-based exemption here is even more strikingly demonstrated by measuring the effect of the system in terms of the actual number of jurors affected. If Missouri utilized a neutral juror selection system, the percentage of women on jury panels could be expected to approximate the percentage of women in the eligible population, 54 percent. The difference between such a non-discriminatory system and Missouri's present system would average 20 persons on a jury panel of 50 members—*i.e.*, 20 persons on an average Jackson County juror panel of 50 who are now men would be replaced by women under a fair, non-sex-based juror selection plan. On an average petit jury of 12, five persons who are now men would be replaced by women. Such a difference is highly significant and persuasively demonstrates that Missouri's juror selection scheme violates constitutional standards.[21]

[21] Of course, even under a neutral selection system the number of men and women on actual jury panels and petit juries would not always mirror the eligible population. "Defendants are not entitled to a jury of any particular composition * * *." *Taylor* v. *Louisiana, supra,* 419 U.S. at 538.

The disparity in Missouri between the percentage of women in the eligible population and that of women in the jury wheel and reporting for jury service equals or exceeds the levels of underrepresentation found unconstitutional in other jury discrimination cases. The percentage of women was reduced in this case by approximately three-quarters, from 54 percent of the eligible population to a mere 14.5 percent of jury panels. This Court has found unconstitutional reduction of 79 percent to 39 percent,[22] of 20 percent to 7 percent,[23] of 60 percent to 37 percent,[24] and of 27.1 percent to 9.1 percent [25] of a large and distinctive group.[26] In *Castaneda* v. *Partida*, *supra*, 430 U.S.

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[22] *Castaneda* v. *Partida*, *supra*, 430 U.S. at 496.

[23] *Alexander* v. *Louisiana*, *supra*, 405 U.S. at 629.

[24] *Turner* v. *Fouche*, *supra*, 396 U.S. at 359.

[25] *Whitus* v. *Georgia*, *supra*, 385 U.S. at 552.

[26] Courts have generally been reluctant to expand the list of "cognizable" or "identifiable" groups in the community beyound categories of race, ethnic groups with a history of discrimination, and sex. A number of cases have held that young persons are not a cognizable group, being diverse in interests and outlook and lacking internal cohesion. *United States* v. *Potter*, 552 F.2d 901 (C.A. 9); *United States* v. *Kirk*, 534 F.2d 1262 (C.A. 8); *United States* v. *Olson*, 473 F.2d 686 (C.A. 8), certiorari denied, 412 U.S. 905; *United States* v. *Kuhn*, 441 F.2d 179 (C.A. 5). See also *Hamling* v. *United States*, 418 U.S. 87. Challenges to the use of voter registration lists as the source of jurors have generally failed because non-voters are not a cognizable group. *Murrah* v. *State of Arkansas*, 532 F.2d 105 (C.A. 8); *United States* v. *Lewis*, 472 F.2d 252 (C.A. 3); *Camp* v. *United States*, 413 F.2d 419 (C.A. 5), certiorari denied, 396 U.S. 968. Also found non-cognizable are persons of "lower economic status," *United States* v. *Greene*, 489 F.2d 1145 (C.A. D.C.), certiorari denied, 419 U.S. 977, and "lower educational level," *United States* v. *Potter*, *supra*.

at 496, a "key man" system of grand juror selection was found constitutionally defective even though a sizable 39 percent of grand jurors were Mexican-American, because the state came forward with no neutral explanation for the discrepancy between that figure and the 79 percent Mexican-American share of the eligible population. Similarly, in *Turner* v. *Fouche*, *supra*, 396 U.S. at 359, this Court held that a grand jury pool that was 37 percent black in a county with a 60 percent black population warranted a finding of unconstitutional underrepresentation, in the absence of a countervailing neutral explanation by county officials. Jury panels averaging only 14.5 percent women cannot be said to be reasonably representative of a community in which women constitute a 54 percent majority.

D. The State Failed to Bear its Burden to Rebut Petitioner's *Prima Facie* Case

It is well-settled that once a defendant demonstrates a substantial underrepresentation of a large and cognizable group and the application of non-neutral selection criteria, the burden shifts to the state to rebut the *prima facie* case of a violation of the fair cross section rule. *Castaneda* v. *Partida*, *supra*, 430 U.S. at 495; *Alexander* v. *Louisiana*, *supra*, 405 U.S. at 632; *Turner* v. *Fouche*, *supra*, 396 U.S. at 361. The State produced no evidence at either of the motions

hearings in which petitioner challenged the underrepresentation of women in the jury pool. Thus, petitioner's evidence concerning the effects of the sex-based exemption is uncontradicted. Nevertheless, the Missouri Supreme Court held that petitioner had failed to establish a *prima facie* case because he had not conclusively demonstrated that no other possible factors contributed to the elimination of women. The court below stated that petitioner had not shown that the percentage of women on the 1976 voter registration list was the same as that reflected in the 1970 Census (Pet. App. A6)[27] and that petitioner had not proven that women do not disproportionately claim other exemptions allowed by Missouri law (*id.* at A7, A8).[28]

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[27] Petitioner's brief points out that there is almost no difference between the voter registration rate of Missouri women (69.9 percent) and men (71.1 percent) (Pet. Br. 4 n. 2).

[28] There is practically no possibility that the disparity between male and female representation on jury panels in Missouri could have been caused by the operation of the other exemption provisions. Almost all of the exempted occupations in Missouri are predominantly male: physicians and osteopaths (7.69 percent female), chiropractors (15.33 percent female), dentists (3.92 percent female), clergymen (2.74 percent female), professors (30.7 percent female), lawyers (3.84 percent female), and judges (9.07 percent female). Only teachers are predominantly female (73.76 percent), and they comprise only 2.65 percent of the adult female population. Government officers and employees are 45 percent female, while women make up just 5.2 percent of the armed forces. A larger percentage of the male (1.1 percent) than female (1.0 percent) population is illiterate. The relatively small percentage of female felons is reflected in statistics for persons incarcerated in 1973 in state prisons (3.08 percent female) and for persons in custody in all correctional institutions in 1970 (3.38 percent female). While 58.7 percent of persons over 65 are female, this could hardly account for the disproportionate share of female jurors in Jackson County since there is not a large difference between the percentage of the total female (16.68 percent) and total male (13.18 percent) population that is over 65. The Jackson County juror questionnaire and summons specifically direct this exemption "to men over 65." Bureau of the Census, *Statistical Abstract of the United States 1977*, Table 221, p. 138, Table 585, p. 367; Bureau of the Census, *Population Profile of the United States: 1977*, Series P-20, No. 324, Table 22, p. 40; U.S. Department of Labor, Bureau of Labor Statistics, *U.S. Working Women: A Databook*, Bulletin 1977, Table 5, p. 7; Bureau of the Census, *1970 Census of Population, Characteristics of the Population, Part 27: Missouri*, Table 20, p. 70, Table 171, p. 695; Bureau of the Census, *Persons in Institutions and Other Group Quarters, 1970 Census of Population* (Subject Report PC (2) 4-E), Table 3, p. 5; U.S. National Criminal Justice Information and Statistics Service, *Census of Prisoners in State Correctional Facilities, 1973* (Special Report No. SD-NPS-SR-3, December 1976).

Here, as in *Castaneda* v. *Partida, supra*, 430 U.S. at 498, "[i]nexplicably, the State introduced * * * no evidence." In the absence of any rebuttal evidence by the state, this Court previously has found it proper to assume that the percentage of the cognizable group measured by the 1970 Census fairly reflects the percentage of that group in the eligible population. *Id.* at 488 n. 8.[29] See also *Alexander* v. *Louisiana, supra*,

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[29] In *Castaneda*, the state argued that the county had experienced population shifts, that the census counted illegal aliens, and that Mexican-Americans were disproportionately illiterate and thus ineligible for jury service. These arguments failed because they were not proven by competent evidence. 430 U.S. at 499.

405 U.S. at 627. Missouri thus had the burden to produce evidence concerning population shifts that might have undermined the presumptive reliability of the 1970 Census or evidence of differential rates of voter registration among the sexes. The Missouri Supreme Court nonetheless impermissibly burdened petitioner with the obligation—requiring him to prove a negative, *i.e.*, that no other imaginable factor contributed to the demonstrated disproportionate elimination of women from the jury pool—and held that his failure to discharge the burden was fatal to his *prima facie* case.

If the State believed that neutral factors rather than the sex-based exemption had contributed to the underrepresentation of women,[30] it had ample oppor-

[30] The State has suggested that the 14.5 percent figure of women on jury panels could have resulted from chance (Br. in Opp. 8). This Court has previously taken note of certain statistical methods for measuring the probability of such underrepresentations. *Castaneda* v. *Partida, supra*, 430 U.S. at 496 n. 17. The first step is to compute the standard deviation, which measures predicted fluctuations from the expected value. (Here, the square root of the product of the total sample of jurors reporting for service (5119) times the probability of selecting a woman (.54) times the probability of selecting a man (.46) results in a standard deviation of 36). The Court noted in *Castaneda* that if the difference between the expected value and the observed number is greater than two or three times the standard deviation, then the randomness of the jury selection is highly suspect. In this case the difference between the expected (2764) and observed (741) numbers of women reporting for jury service was 2023, or approximately 56 standard deviations. The probability that this extreme divergence resulted from chance is thus infinitesimal. The Court described as "negligible" the likelihood that a much less extreme situation in *Castaneda* (12 standard deviations) had resulted from chance. 430 U.S. at 497 n. 17. See also *Whitus* v. *Georgia, supra*, 385 U.S. at 552 n. 2; *Alexander* v. *Louisiana, supra*, 405 U.S. at 630 n. 9.

tunity to offer proof at the two motions hearings. Having failed to do so, it may not now challenge the reliability of petitioner's statistics. It was likewise impermissible for the Missouri Supreme Court to speculate that women may have claimed other exemptions disproportionately in the absence of any evidence thereof and to hold that petitioner's *prima facie* case was rebutted by such speculation. As this Court stated in *Castaneda* v. *Partida, supra*, 430 U.S. at 499:

> These are questions of disputed fact that present problems not amenable to resolution by an appellate court. * * * [W]e are not saying that the statistical disparities proved here could never be explained in another case; we are simply saying that the State did not do so in this case.

Because petitioner established a *prima facie* case of underrepresentation of women that the State did not rebut, a violation of the fair cross section rule has been shown.

II

NEITHER WOMEN'S PRESUMED FAMILY ROLE NOR ADMINISTRATIVE CONVENIENCE IS AN ADEQUATE REASON TO JUSTIFY A VIOLATION OF THE "FAIR CROSS SECTION" RULE

Although the Missouri Supreme Court cited no interest of the State that might be advanced to support

the automatic exemption of women from jury service, it alluded to the fact that exemptions from jury duty are generally intended "to promote the orderly and efficient operation of overloaded judicial systems" (Pet. App. A4). *Taylor* v. *Louisiana*, *supra*, established, however, that a state must assert more than merely rational reasons to justify a juror selection system that results in the substantial underrepresentation of a large and cognizable group. 419 U.S. at 534. *Taylor* specifically held that an exemption of women solely on the basis of sex could not be justified by women's "presumed role in the home" or by administrative convenience. 419 U.S. at 534-535:

> It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare *any* women from their present duties. This may be the case with many, and it may be burdensome to sort out those who should be exempted from those who should serve. But that task is performed in the case of men, and the administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials. [Emphasis in original; footnote omitted.]

The Court also took judicial notice of statistics concerning the labor force participation rates of women, statistics that "put to rest the suggestion that all women should be exempt from jury service based solely on their sex * * *." *Id.* at 535 n.17. The trends

noticed by this Court have continued apace,[31] undermining whatever reasons might have existed in the past to justify Missouri's automatic exemption.

If Missouri is reluctant to require jury service by women with full-time child-care responsibilities, there are available less sweeping means for exempting that relatively small minority of women. Numerous states [32] and federal judicial districts [33] have adopted

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[31] In March 1976, the month of petitioner's trial, 46.1 percent of women with children under 18 and 37.4 percent of women with children under 6 were in the work force. Only a small minority of women, 19.39 percent, both had children under 18 and were not in the work force. U.S. Department of Labor, Bureau of Labor Statistics, *U.S. Working Women: A Datebook*, Bulletin 1977, Tables 19, 22. The labor force participation rate for Missouri women in 1975 was 52.89 percent. Bureau of the Census, *Money Income and Poverty Status in 1975 of Families and Persons in the United States and the North Central Region*, Series P-60, No. 111, April 1978, Table 12B.

[32] See note 12, *supra*.

[33] The federal district courts, subject to approval by a reviewing panel of the relevant circuit, are required to promulgate juror selection plans under the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.* The statute explicitly requires that jurors be selected at random and from a "fair cross section" of the community. 28 U.S.C. 1861. Such plans may specify groups of persons whose members may be automatically excused on individual request because service would cause extreme inconvenience or undue hardship. 28 U.S.C. 1863(b)(5). Nineteen districts have sex-neutral child-care exemptions: N.D. Alabama, Arizona, N.D. California, Colorado, District of Columbia, S.D. Florida, N.D. Indiana, W.D. Kentucky, Massachusetts, W.D. Michigan, E.D. Missouri, New Hampshire, N.D. New York, W.D. New York, Oregon, E.D. Pennsylvania, M.D. Tennessee, E.D. Wisconsin, W.D. Wisconsin. Almost all of these sex-neutral exemptions were added

juror selection plans with sex-neutral exemptions for persons with child-care obligations. Many other states and federal district courts consider individual claims of hardship from parents whose presence in the home is required, under general hardship excuse statutes.[34]

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by amendment after this Court's decision in *Taylor*, replacing child-care exemptions restricted to "women" or "mothers" with children below a specified age.

While 65 federal districts retain child-care exemptions restricted to women, there is a recognized trend toward non-sex-based exemptions. The prevalence of the sex-based child-care exemption is partly explained by the suggestion in the Senate (S. Rep. No. 891, 90th Cong., 1st Sess. 28 (1967)) and House (H.R. Rep. No. 1076, 90th Cong., 2d Sess. 11 (1968)) reports that "mothers with young children" might be a suitable class under Section 1863(b)(5) for hardship excuse. This legislative history predates this Court's opinion in *Taylor*. In any event, there is no indication that such child-care exemptions disproportionately eliminate women from federal jury panels. Prior to a 1977 amendment, the juror selection plan for the District of Oregon limited its child-care excuse to women but nevertheless had a larger percentage of women on its jury panels (52.1 percent) than in the district's population (51.9 percent). *United States* v. *Armsbury*, 408 F. Supp. 1130 (D. Ore.).

[34] Most states have no specific child-care exemption, providing instead a general hardship excuse allowing individual requests. See, *e.g.*, Ala. Code § 12-16-5 (1975); Ariz. Rev. Stat. § 21-315 (1975); Ark. Stat. Ann. § 39-107 (Supp. 1975); Cal. Civ. Proc. Code § 200 (West Supp. 1978); Colo. Rev. Stat. § 13-71-112 (1973); Del. Code Ann. tit. 10, § 4529 (1974); Idaho Code § 2-212 (Supp. 1977); Ind. Code Ann. § 33-4-5.5-15 (1975); Iowa Code § 607.3 (1975); Kan. Stat. Ann. § 43-155 (1973); La. Code Crim. Pro. Ann. art. 783 (Supp. 1978); Me. Rev. Stat. Ann tit. 14, § 1213 (Supp. 1977); Mich. Stat. Ann. § 27A.1320 (1976); Miss. Code Ann. § 13-5-23 (Supp. 1976); Neb. Rev. Stat. § 25-1601 (1975); Nev. Rev. Stat. § 6.030 (1977); N.M. Stat. Ann. § 19-1-2 (Supp. 1975); N.C. Gen. Stat. § 9-6 (1969); N. D. Cent. Code Ann. § 27-09.1-11 (1974); Ohio Rev. Code Ann. § 2313.16 (1954); Ore. Rev. Stat. § 10.050 (Supp. 1975); Pa. Stat. Ann. tit. 17, § 1301.11 (Supp. 1978); R.I. Gen. Laws § 9-10-9 (1970); Vt. Stat. Ann. tit. 12 App. VII, Pt. 1, R. 28 (1973); Wash. Rev. Code Ann. § 2.36.100 (1961); W. Va. Code Ann. § 52-1-2 (1966); Wis. Stat. Ann. § 255.02 (1971).

The following federal judicial districts also provide only a general hardship provision: Guam, E.D. Kentucky, E.D. Michigan, N.D. Mississippi, E.D. North Carolina, M.D. North Carolina, Vermont, E.D. Washington.

Section 11 of the Uniform Jury Selection and Service Act (Uniform Laws Ann. 1975) also provides only a general hardship excuse requiring an individual showing of need or inconvenience. There is no reason to believe that a reasonable child-care exemption or a general hardship provision would violate the fair cross section rule through disproportionate elimination of women or any other sizable and distinctive group.[35] Substantial reasons could be ad-

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[35] Only 16.84 percent of women in March 1976 had children under the age of 13 and were not in the work force. *U.S. Working Women, supra*, Table 19.

An example of the change in jury composition that results when an automatic exemption for women is replaced by a sex-neutral child-care exemption is the experience of Erie County, New York. In 1974, when an automatic exemption for women solely on the basis of sex was still available, only 10 percent of jurors were women. Following the repeal of the automatic exemption (N.Y. Jud. Law § 599), the implementation of a computerized system of juror selection from registered voter lists, and the enactment of a sex-neutral child-care exemption (N.Y. Jud. Law § 599(7)), the proportion of women jurors rose dramatically. From January through June 1976, women comprised 49.7 percent of jurors performing service. Although a substantial majority of persons requesting the child-care excuse were women (84.6 percent), some

vanced to justify a child-care excuse tailored to cover persons actually in need of it. Child-caring is a time-consuming and responsible job analogous to the other professions whose members are granted exemptions from jury service on individual request.

In sum, neither the presumed family responsibilities of women nor the administrative convenience of avoiding individual determinations of need is a sufficient reason to justify an automatic exemption for women that violates the fair cross section rule. Although *Taylor* v. *Louisiana* permits states "to provide reasonable exemptions" from jury service, 419 U.S. at 538, a blanket exemption for women solely on the basis of sex is not reasonable, particularly where, as here, it disproportionately eliminates women from jury pools. Missouri remains free to formulate an exemption from jury service for persons whose actual presence in the home is necessary for the care of children.

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men did make successful requests. Levine and Schweber-Koren, *Jury Selection in Erie County: Changing a Sexist System*, 11 Law and Society Rev. 43 (1976).

CONCLUSION

The judgment of the Supreme Court of Missouri should be reversed.

Respectfully submitted.

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